Supreme Court, U.S.
FILED

96 897 NOV 27 1996

OFFICE OF THE CLERK

No. 96-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES BOOKER

Petitioner,

v.

JAMES WARD, THOMAS KELLY,
WILLIAM OWENS AND TORRENCE LEWIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
CECILE L. SINGER
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

(312) 427-3200
Attorneys for Petitioner

77 pp

QUESTIONS PRESENTED

1. Should the Court resolve the conflict between the circuits about application of *Heck v. Humphrey,* 114 S.Ct. 2364 (1994) to accrual of a damage action arising from an unlawful arrest which resulted in a criminal conviction?

2. Is the finding of fact made by a state appellate court that arresting officers did not have probable cause to arrest enough evidence to defeat the arresting officers' motion for summary judgment on the same issue in a federal civil rights case?

INDEX

QUESTIONS PRESENTED 1

OPINIONS BELOW 2

JURISDICTION 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT 6

1. Heck v. Humphrey 6

2. Respect for State Court Findings 8

CONCLUSION 11

TABLE OF CASES

Brooks v. City of Winston-Salem, N.C., 85 F.3d 178 (4th Cir. 1996) 7

Brown v. Illinois, 422 U.S. 590 (1975) 5

Calero-Colon v. Betancourt-Lebron, 68 F.3d 1 (1st Cir. 1995) 8

Heck v. Humphrey, 114 S.Ct. 2364 (1994) 1, 6-8

Hudson v. Hughes, 98 F.3d 868 (5th Cir. 1996) 8

Jackson v. Vannoy, 49 F.3d 175 (10th Cir. 1995) 8

Mackey v. Dickson, 47 F.2d 744 (5th Cir. 1995) 8

People v. Booker, 209 Ill.App.3d 384, 568 N.E.2d 211 (1991) 5

Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996) 7

Schilling v. White, 58 F.3d 1081 (6th Cir. 1995) 8

Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995) 7

Smithart v. Towery, 79 F.3d 951 (9th Cir. 1996) 7

Stone v. Powell, 428 U.S. 465 (1976) 8

Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996) 8

Woods v. Candela, 47 F.3d 546 (2d Cir. 1995), *on remand from* 115 S.Ct. 44 (1994) 8

42 U.S.C. §1983 ..... passim

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 9

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES BOOKER

Petitioner,

v.

JAMES WARD AND THOMAS KELLY,
WILLIAM OWENS AND TORRENCE LEWIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Charles Booker respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 29, 1996.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-10) is reported at 94 F.3d 1052. The opinions of the district court are reported at 1991 WL 622642 (App. 12-15), 888 F.Supp. 869 (App. 16-29), and 906 F.Supp. 483. (App. 30-43.) The opinion of the Illinois Appellate Court finding that petitioner

had been arrested without probable cause and remanding for an attenuation hearing is reported at 209 Ill.App.3d 384, 568 N.E.2d 211 (1991) and appears at App. 43-53. The opinion of the Illinois Appellate Court following the attenuation hearing is unreported and is reproduced at App. 54-61.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 11) was entered on August 29, 1996; petitioner did not seek rehearing.

STATEMENT

In 1987, the petitioner Charles Booker was arrested and charged with the murder of Booker's girlfriend, Lucy Williams. As summarized by the Illinois Appellate Court, "[t]he circumstances of the murder did not suggest any particular perpetrator. Lucy was found in an alley behind her home, beaten to death, with her purse missing. These facts do not even lead one to conclude that the perpetrator was someone Lucy knew, and since there were no known witnesses to the murder, the list of possible suspects was limitless." (App. 52.)

While the police were investigating the homicide, petitioner learned that Williams had been killed, went to her apartment, and offered to help the police in their investigation. (App. 44.) Thereafter, petitioner agreed to go to the police with respondents Owens and Lewis, police detectives. *Id.*

Petitioner arrived at the police station at about 11:30 a.m. (App. 51) and remained there until about 3:00 p.m., when respondents Kelly and Ward took him for a polygraph examination. (App. 45.) Before being taken for the polygraph, petitioner had been required by respondents Owens and

Lewis to present his fingernails, shoes, and feet for inspection. *Id.*

Respondents Ward and Kelly began to interrogate petitioner at the police station at about 2:00 p.m. The officers preceded their questioning with *Miranda* warnings. (App. 45.) Petitioner told the detectives that on the previous night he had gone to the home of Matilda Clark at about midnight, and had remained there until 7:40 that morning, when he left for work. *Id.* Respondents Ward and Kelly then asked petitioner to submit to fingerprinting and take a polygraph test. *Id.*

When Ward and Kelly took petitioner for the polygraph, the only evidence linking plaintiff to the offense was information the officers had received from Elaine Sims, who had told the officers about the relationship plaintiff had with Ms. Williams and that plaintiff drank heavily and sometimes had memory losses. (App. 45.) The Illinois Appellate Court concluded that this was not enough evidence to establish probable cause to arrest. (App. 52.)

After administering the polygraph, the examiner told respondents Ward and Kelly that plaintiff was trying to be deceptive. At the direction of Ward and Kelly, the examiner continued to interrogate plaintiff and "[a]t this point, Booker admitted to the examiner that he had lied, but indicated only that he had driven past Lucy's house a couple times on the previous evening and that he had chosen not to inform the detectives of this fact because he did not want to become involved in the investigation." (App. 46.) The polygraph examiner shared this information with respondents Ward and Kelly and they informed plaintiff that he was under arrest. *Id.*

The state trial judge and the state appellate court found that plaintiff's post-polygraph statement was exculpatory, did not go beyond the limits of denying involvement, and did not establish probable cause to arrest. (App. 46, 52.)

After petitioner made his post-polygraph statement, he was subjected to additional interrogation and subsequently made an inculpatory oral statement which was used to secure his conviction. (App. 57-58.)

On direct appeal, the Illinois Appellate Court found that petitioner had been arrested without probable cause and remanded the case for a determination of whether petitioner's inculpatory oral statement was the tainted fruit of the arrest. *People v. Booker,* 209 Ill.App.3d 384, 568 N.E.2d 211 (1991). (App. 43-53.) In a second appeal, the state appellate court concluded that the oral statement was inadmissible under *Brown v. Illinois,* 422 U.S. 590 (1975) and ordered a re-trial. (App. 54-61.) Thereafter, the prosecution was granted leave to nolle prosequi the charges; petitioner was released from custody and all charges were dismissed on October 11, 1994. (App. 19.)

On August 10, 1990, while his direct appeal was pending, petitioner had filed a *pro-se* damages action udner 42 U.S.C. §1983 against several persons involved with his state criminal prosecution, including respondents Kelly and Ward. The district court initially stayed federal proceedings (App. 12 n.1) and on February 24, 1992, dismissed the civil action with leave to reinstate following disposition of the criminal case.

After the state criminal proceedings had been dismissed, the district court reinstated the case and permitted petitoner to file an amended complaint adding respondents Owens and Lewis as defendants.[1] (App. 16.) The gist of plaintiff's claim

---

1. Respondents Owens and Lewis were alleged to have restrained petitioner at the police station before respondents Ward and Kelly took petitioner for the polygraph.

was that, by arresting him without probable cause, the officers had caused petitioner's conviction and incarceration.

Respondents Owens and Lewis moved to dismiss on statute of limitations grounds, arguing that petitioner's claim had accrued when he was arrested, which was more than two years (the statute of limitations for §1983 claims in Illinois) before these respondents had been joined in the action. The district court accepted this argument and dismissed petitioner's claims against Owens and Lewis as barred by the statute of limitations. (App. 25-26.)

Respondents Ward and Kelly then moved for summary judgment, arguing that their actions had been based on probable cause. Petitioner relied on the findings of the state appellate court, but the district court found Ward and Kelly had acted with probable cause. (App. 40.)

On appeal, the Seventh Circuit affirmed, finding that petitioner's claim against respondents Owens and Lewis had accrued at the time of the arrest and was therefore barred by the statute of limitations. (App. 5-6.) The court of appeals concluded that resondents Ward and Kelly had not restrained petitioner until after the polygraph examination (App. 9) and that they had acted with probable cause. *Id.* The Seventh Circuit refused to afford any weight to the contrary findings of the Illinois Appellate Court because "Ward and Kelly were not parties to the state court proceedings and did not have a full and fair opportunity to litigate the issue of whether they had probable cause to arrest Booker." (App. 8.)

REASONS FOR GRANTING THE WRIT

1. Heck v. Humphrey

This case raises important and recurring questions involving this Court's decision in *Heck v. Humphrey*, 114 S.Ct. 2364 (1994) as it applies to damage actions under 42 U.S.C.

§1983 involving claims of unlawful arrest.

In *Heck v. Humphrey, supra,* the Court held that a Section 1983 "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." (footnote omitted) 114 S.Ct. at 2374. The Court held that the civil action would not accrue if success in the damage action "would necessarily imply the invalidity of [the plaintiff's] conviction or sentence." *Id.* The lower federal courts have adopted conflicting views of what the Court meant by "necessarily imply."

In its decision in this case, the Seventh Circuit applied its rule that the invalidity of a criminal conviction would not be "necessarily implied" when evidence, used to secure a state criminal conviction, is found to be the "tainted fruit" of an arrest made without probable cause.[2] (App. 5-6.) The Court of Appeals acknowledged that the criminal case against petitioner was dismissed after the state appellate court had found that the oral statement was the "tainted fruit" of the unlawful arrest, but reasoned that when evidence is suppressed because of an unlawful arrest, "in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial." (App. 6.) The Fourth Circuit has adopted a similar rule. *Brooks v. City of Winston-Salem, N.C.,* 85 F.3d 178, 184 (4th Cir. 1996).

The Courts of Appeals for the First, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have adopted the contrary rule that a damage action arising from an allegedly unlawful arrest does not accrue until criminal proceedings

---

2. *See, e.g., Simpson v. Rowan,* 73 F.3d 134, 136 (7th Cir. 1995); *Reed v. City of Chicago,* 77 F.3d 1049 (7th Cir. 1996).

have been resolved in favor of the civil rights plaintiff. *Calero-Colon v. Betancourt-Lebron,* 68 F.3d 1 (1st Cir. 1995); *Woods v. Candela,* 47 F.3d 546 (2d Cir. 1995), *on remand from* 115 S.Ct. 44 (1994); *Mackey v. Dickson,* 47 F.2d 744 (5th Cir. 1995); *Hudson v. Hughes,* 98 F.3d 868 (5th Cir. 1996); *Schilling v. White,* 58 F.3d 1081 (6th Cir. 1995); *Smithart v. Towery,* 79 F.3d 951 (9th Cir. 1996); *Jackson v. Vannoy,* 49 F.3d 175 (10th Cir. 1995); *Whiting v. Traylor,* 85 F.3d 581 (11th Cir. 1996).

The rule applied by the Seventh Circuit in this case that petitioner's cause of action accrued before his conviction was reversed and criminal proceedings dismissed is inconsistent with the holding of *Heck v. Humphrey,* 114 S.Ct. 2364 (1994) that a Section 1983 "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." (footnote omitted) 114 S.Ct. at 2374. The majority rule that an action for damages arising from an allegedly unlawful arrest does not accrue unless and until criminal proceedings have been resolved in favor of the civil rights plaintiff is faithful to the teaching of *Heck.* Certiorari should be granted to resolve this conflict.

2. Respect for State Court Findings

The court of appeals rejected petitioner's request to adopt a strict rule that the finding by a state appellate court that an arrest was made without probable cause is enough evidence to defeat the arresting officer's motion for summary judgment on the same issue in a federal civil rights case. (App. 7-8.) The merits of this proposed rule is an important question that should be resolved by this Court.

In *Stone v. Powell,* 428 U.S. 465 (1976), the Court held that federal courts could not grant habeas corpus relief to state prisoners on Fourth Amendment issues unless the prisoner had been denied an opportunity for a full and fair litigation of the claim at trial and on direct review. In answering

arguments that the state courts were incapable of adjudicating Fourth Amendment issues, the Court held that state courts were a "fair and competent forum for the adjudication of federal constitutional rights." *Id.* at 493 n.35. A similar policy of respect for the judgments of state courts underlies the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, which adds a strong presumption of correctness to determinations of state courts. These principles of comity are inconsistent with the refusal of the federal courts in this case to afford any weight to the state court finding that petitioner had been arrested without probable cause.

The legality of petitioner's arrest was vigorously litigated in state court. The issues decided by the state court – when petitioner was "seized" under the Fourth Amendment and whether there had been probable cause at the time of the seizure – are the same issues that petitioner raised in his civil rights complaint. Nothing in the state trial record suggests that respondents were not permitted to testify fully about their actions. Moreover, the probable cause issue was not decided in some sort of summary proceeding, but was resolved after full briefing and argument before the state appellate court.

A decent respect for the state courts should stop a federal court from reviewing the same evidence and holding, as the court of appeals did in this case, that an arrest had been based on with probable cause. It is arguable that there would not be any comity bar to a jury verdict that conflicts with the state court finding. But it can only exacerbate state-federal relations to permit a district judge to review the same evidence that was before the state courts and, applying the same legal principles, hold as a matter of law that there had been probable cause to arrest.

In this case, the Illinois Appellate Court considered the evidence adduced at trial and held that plaintiff had been

seized before he was taken for the polygraph examination and that even if plaintiff had been seized after the polygraph, the facts known to the police did not amount to probable cause. (App. 51-52.) Respondents did not argue in the courts below that any evidence had been withheld from the state court, but asked the federal courts to make different inferences from the evidence. The district court and the court of appeals wholeheartedly accepted this invitation.

The Illinois Appellate Court expressly found that "the circumstances of the murder did not suggest any particular perpetrator," (App. 52), "do not even lead one to conclude that the perpetrator was someone Lucy knew," *id.*, and that "the list of possible suspects was limitless." *Id.*

The Seventh Circuit rejected these findings, concluding that the "physical evidence at the crime scene . . . suggested that Williams' killer knew her and was filled with rage against her." (App. 8.)

The state trial judge and the state appellate court found that plaintiff's post-polygraph statement was exculpatory, did not go beyond the limits of denying involvement, and did not establish probable cause to arrest. (App. 46, 52.)

The Seventh Circuit disagreed, holding that the post-polygraph statement "taken with the other information known to Ward and Kelly, established probable cause to arrest Booker." (App. 9.)

A federal court should not be permitted to ignore the finding of a state appellate court that an arrest was made without the quantum of probable cause required by the Fourth Amendment. The finding by a state appellate court that an arrest was made without probable cause should be sufficient to defeat the arresting officer's motion for summary judgment on the same issue in a federal civil rights case.

CONCLUSION

The petition for writ of certiorari should be granted.

November, 1996

KENNETH N. FLAXMAN
CECILE L. SINGER
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
Attorneys for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

CHARLES BOOKER

Plaintiff-Appellant,

v.

JAMES WARD and THOMAS KELLY,
Chicago Police Detectives,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4602 **William T. Hart,** *Judge.*

ARGUED JUNE 6, 1996—DECIDED AUGUST 29, 1996

Before BAUER, ROVNER, and DIANE P. WOOD,
Circuit Judges.

BAUER, Circuit Judge.

On August 7, 1987, the defendants arrested Charles Booker for the murder of his fiancee, Lucy Williams. Booker confessed shortly after his arrest, and a jury convicted him of first degree murder. The Illinois Appellate Court found that probable cause did not exist to arrest Booker, reversed the conviction, and remanded the case for a hearing on the admissibility of Booker's confession. *People v. Booker,* 209 Ill. App. 3d 384, 393, 395, 568 N.E.2d 211, 218, 219 (Ill. App. 1 Dist. 1991) ("*Booker I*"). After the trial court found the confession sufficiently attenuated from the arrest to be admissible, the Appellate Court again reversed, holding that Booker's confession was the product of an unlawful arrest. *People v. Booker,* No. 92-0956, unpublished (Ill. App. 1 Dist. 1994). The trial court then dismissed the charges upon the prosecution's motion for a nolle prosequi order.

Despite his confession, in August 1990 Booker filed an unlawful arrest claim in federal court pursuant to 42 U.S.C. §1983, seeking damages from Chicago Police Detectives Thomas Kelly and James Ward for

his allegedly unlawful arrest and imprisonment "for crimes these defendants know plaintiff did not commit." In February 1992, the district court dismissed the case with leave to reinstate within 60 days after disposition of the state court proceedings. The court reinstated the case in November 1994. In February 1995, Booker filed his amended complaint naming Owens and Lewis as defendants in his unlawful arrest claim.[1]

The district court granted Owens' and Lewis' motion to dismiss because Booker had not added them as defendants within the two-year statutory limitations period for §1983 claims. The district court also granted Kelly's and Ward's motion for summary judgment, holding that probable cause existed for them to arrest Booker and that even if it did not, they were entitled to qualified immunity for their actions. We affirm.

BACKGROUND

On the morning of August 7, 1987, Lucy Williams' partially clothed body was discovered in a parking lot behind her apartment building. She had been bludgeoned to death between 4:00 a.m. and 4:30 a.m., the time she usually left for work. Williams' pants and underpants lay around her ankles. A rubber floor mat from Williams' car covered her groin area. Williams had no bruises in her genital area, nor was any semen found. P Kelly and Ward arrived at the scene at 8:45 a.m. Based on their experience and the physical evidence, the detectives concluded that the killer likely knew Williams. The "overkill" evident from the numerous head wounds, and the lack of bruising and semen in the genital area, indicated that the attack was not a sexual assault, but instead was an act of rage against Williams. A random killer likely would not have placed the car mat over Williams' groin to prevent the exposure of her genital area. A piece of metal protruding from the flat front left tire of Williams' car indicated that the killer may have planned the attack and wished to prevent Williams from leaving the

---

1. Booker also named Detective Steven Glynn as a defendant in the unlawful arrest claim, and asserted an Illinois state law malicious prosecution claim against the City of Chicago and Detectives Ward and Kelly. He does not appeal the district court's order dismissing Glynn from the case, nor does he appeal the dismissal of the malicious prosecution claim.

area. This evidence of premeditation suggested that the killer knew Williams' work schedule.

Ward and Kelly interviewed a number of people at the crime scene. Williams' son Curtis told the detectives that his mother had returned from a date the previous evening between 8:30 p.m. and 8:45 p.m. Curtis last saw his mother alone in her bed at around 10:30 p.m. A neighbor told Ward and Kelly that she heard a scream between 4:00 and 4:30 that morning, the time Williams usually left for work.

That morning, Booker received a telephone call at about 8:30 a.m. from a person at Williams' workplace inquiring about her absence. Booker telephoned Williams' apartment and "learned" she had been killed. Booker then went to her apartment, where he met Detectives Lewis and Owens. Owens contacted Kelly, who requested that Owens ask Booker if he voluntarily would accompany Owens and Lewis to the Area One headquarters to help with the investigation. Booker agreed, saying that he wanted to help in any way he could.

On the way to the station, they stopped for soft drinks and cigarettes. The three men arrived at the station between 11:30 a.m. and 11:45 a.m. When Booker asked why he was being held, Lewis and Owens told him that he was not being held, but asked him to wait for Ward and Kelly to arrive. Throughout the time he waited at the station and during the ride to the station, Booker was not handcuffed, restrained, or threatened with physical force. The officers allowed Booker to use the bathroom and the telephone in the lineup room while he waited, although an officer sat at the desk while he used the telephone. Neither Owens nor Lewis expressly told Booker that he could leave or refuse to answer questions. Before Ward and Kelly arrived at the station, Owens and another officer examined Booker's fingernails and shoes for blood. No one told Ward and Kelly of this examination.

While Booker waited at the station, Ward and Kelly continued their interviews. Elaine Sims, Williams' cousin, told them that Williams and Booker had lived together, but that Williams had asked Booker to move out three weeks before because she no longer wanted to live with or marry him. Sims also said that Williams recently had had an abortion, but told Booker she had miscarried. Sims did not say that Booker had discovered Williams'

lie, but did tell the detectives that Booker was very jealous, drank heavily, and often would forget what he did while drinking. However, Sims did not say that Booker was violent or that he ever had threatened to harm Williams.

Ward and Kelly arrived at the station between 1:00 p.m. and 1:30 p.m. At around 2:00 p.m., they began interviewing Booker in the lineup room where he had been waiting. Before they asked any questions, Ward and Kelly read Booker a standard Miranda warnings form and Booker signed the form. Although they did not expressly tell Booker he could leave, the Miranda warnings advised him of his right to not answer questions. Booker told the detectives that he had tried to reach Williams by telephone at about 8:00 p.m. the previous evening, and that he had talked to her about an hour later. He did not mention having any other contact with Williams that night. Booker stated that he had been out drinking with friends throughout the evening, that he slept at his girlfriend's home, and that he did not leave her home until 7:40 a.m. that morning. He denied any knowledge of or participation in Williams' murder. During the interview, a record check indicated that Booker did not have a criminal record.

At the detectives' request, Booker agreed to provide fingerprints and to take a polygraph examination. The detectives did not tell Booker that he could leave or that he could refuse. Before administering the polygraph, the examiner read Booker his Miranda warnings and Booker signed a form acknowledging that his participation in the examination was voluntary. After the hour-long examination, the examiner told Ward and Kelly that he believed Booker was being untruthful and uncooperative, and that he was trying to beat the machine. With the detectives' approval, the examiner told Booker that he could not pass him on the test. Booker then admitted that he had lied, and that he had driven by Williams' apartment building twice during the previous night and early morning. Ward and Kelly then told Booker he was under arrest. That evening, Booker confessed to beating Williams to death with a pipe. Booker's confession detailed why he pulled her pants down and covered her groin area with the car mat.

ANALYSIS

I. Motion to Dismiss

The district court dismissed Booker's unlawful arrest claims against Lewis and Owens because Booker had not sued them within the two-year statutory limitations period. The district court concluded that Booker's §1983 claim for unlawful arrest in violation of the Fourth Amendment accrued at the time of his arrest on August 7, 1987. We review the district court's ruling de novo. *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

a. Heck v. Humphrey

Booker claims that the defendants arrested him without probable cause on August 7, 1987. But he did not sue Lewis and Owens for unlawful arrest pursuant to 42 U.S.C. §1983 until February 13, 1995. The statute of limitations for section 1983 claims arising in Illinois is two years. *See Farrell v. McDonough*, 966 F.2d 279, 282 (7th Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993). To determine when Booker's §1983 claim against Lewis and Owens accrued, we look to a recent Supreme Court decision on which both sides rely for opposite conclusions, *Heck v. Humphrey*, 114 S. Ct. 2364 (1994).

In Heck, the §1983 plaintiff sued county prosecutors and a state police investigator for committing unlawful acts to secure his state court conviction. The Court affirmed the dismissal of the plaintiff's action, holding that a plaintiff seeking damages for an allegedly unconstitutional conviction or imprisonment, or for other harms caused by unlawful actions that would render a conviction or sentence invalid, has no §1983 cause of action until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. *Id.* at 2372, 2373. In other words, if a judgment in favor of the plaintiff "would necessarily imply the invalidity of his conviction or sentence," id. at 2372 (emphasis added), the lawsuit cannot go forward unless the plaintiff's conviction or sentence already has been invalidated. If, on the other hand, the "plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," then the plaintiff does have a §1983

cause of action. *Id.* (emphasis in original). *Heck* added that, because of doctrines such as independent source, inevitable discovery, and harmless error, claims seeking damages for unreasonable searches were the type that "would not necessarily imply that the plaintiff's conviction was unlawful." *Id.* at n.7 (emphasis in original).

Booker contends that success on his unlawful arrest claim would necessarily imply the invalidity of his conviction, and that therefore under Heck he could not bring his §1983 unlawful arrest claim until October 1994, when the trial court vacated his conviction. We disagree, because a wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction. *See Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995), *petition for cert. filed* (May 16, 1996) (No. 95-8993); *Perez v. Sifel*, 57 F.3d 503, 505 (7th Cir. 1995). *See also Rooding v. Peters*, 1996 WL 454497 (7th Cir. Aug. 13, 1996). Although in this case the Illinois Appellate Court's conclusion that Booker's confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial. As it happens, here the prosecutor did not have such other evidence to produce against Booker. But there is nothing necessary or inevitable about that result. Indeed, the Appellate Court's remand for an attenuation hearing shows that success on Booker's unlawful arrest claim would not necessarily undermine the validity of his conviction. We conclude that Booker's §1983 unlawful arrest claim against Owens and Lewis accrued on the day of his arrest, August 7, 1987. Because he did not bring his §1983 claim against Owens and Lewis until February 1995, the two-year statute of limitations bars his suit.

b. Equitable Tolling of Limitations Period

Booker relies in the alternative on a ground the district court addressed sua sponte: that the statute of limitations was equitably tolled while the case was dismissed pending the conclusion of state court proceedings. The doctrine of equitable tolling provides that "a person is not required to sue within the statutory period if he

cannot in the circumstances reasonably be expected to do so." *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993), *aff'd on other grounds*, 114 S. Ct. 2364 (1994). But equitable tolling does not give a plaintiff "an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim." *Id.* Instead, it gives the plaintiff only the extra time that he needs, despite all due diligence on his part, to file his claim. *Id.*

The district court concluded that, even if the doctrine of equitable tolling otherwise would apply, Booker's lack of diligence in adding Owens and Lewis as defendants at an earlier stage of the proceedings precluded it. We agree. Booker's case was pending for eighteen months before the district court dismissed it with leave to reinstate, and Booker had numerous opportunities to name Owens and Lewis as defendants during that time. Their names were not hidden from Booker. In fact, Owens and Lewis testified at Booker's trial, and the Illinois Appellate Court's January 1991 decision in *Booker I* specifically mentioned them by name. Because Booker did not act diligently in naming Owens and Lewis as defendants before the district court dismissed the case with leave to reinstate, the doctrine of equitable tolling does not save him. i*See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991).

II. Summary Judgment

The district court granted summary judgment for Ward and Kelly on Booker's unlawful arrest claim because it concluded that the detectives had probable cause to arest Booker and that even if probable cause did not exist, the detectives were entitled to qualified immunity. We review the district court's summary judgment order de novo. *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1243 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 937 (1995).

As we noted above, the Illinois Appellate Court found that probable cause did not exist to arrest Booker for Williams' murder on August 7, 1987. Booker urges us to "adopt a strict rule that the finding by a state appellate court that an arrest was made without probable cause is enough evidence to defeat the arresting officer's motion for summary judgment on the same issue in a federal civil rights case." Indeed, Booker urges us to go further and hold that

such a finding is conclusive on the probable cause issue. We decline to adopt either proposition because Ward and Kelly were not parties to the state court proceedings and did not have a full and fair opportunity to litigate the issue of whether they had probable cause to arrest Booker. *See Kraushaar v. Flanigan*, 45 F.3d 1040, 1050-51 (7th Cir. 1995); *Williams v. Kobel*, 789 F.2d 463, 470 (7th Cir. 1986).

To succeed on his unlawful arrest claim against Ward and Kelly, Booker must prove that they arrested him without probable cause. *Jones by Jones v. Webb*, 45 F.3d 178, 181 (7th Cir. 1995). A law enforcement officer has probable cause to arrest when "the facts and circumstances within [his] knowledge and of which [he has] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense. *Id.*, quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964). We evaluate probable cause "not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person in the position of the arresting officer— seeing what he saw, hearing what he heard." *Mahoney v. Kesery*, 976 F.2d 1054, 1057 (7th Cir. 1992) (emphasis in original). Although the issue of probable cause in a damages suit like this one generally is a jury question, the court appropriately may conclude that probable cause existed as a matter of law "when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them." *Sheik-Abdi*, 37 F.3d at 1247.

In deciding whether the district court properly resolved this issue on summary judgment, we consider only the information actually known to Ward and Kelly when they arrested Booker after he admitted lying to them about his activities the night of Williams' murder. At that time, Kelly and Ward had seen the physical evidence at the crime scene, including evidence of "overkill" and that the attack was planned, which suggested that Williams' killer knew her and was filled with rage against her. They had learned from Williams' cousin Elaine Sims about Booker's and Williams' failed relationship and that Williams had lied to Booker about her miscarriage. Sims also told them that Booker was jealous, drank heavily, and often forgot what he did while drinking. Booker himself told the detectives that he had been drinking with friends the previous evening. Ward and Kelly knew that Booker had not

passed the polygraph examination. *See Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 405-06 (5th Cir. 1989) (results of polygraph examination can be considered in probable cause determination). *See also Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990). Ward and Kelly also knew that Booker had lied to them about being in the vicinity of Williams' apartment building during the night and early morning hours. This lie, taken with the other information known to Ward and Kelly, established probable cause to arrest Booker, not only because lying about an incriminating fact can indicate guilt, *see United States v. Leung*, 929 F.2d 1204, 1208 (7th Cir.), *cert. denied*, 502 U.S. 906 (1991), but because Booker's subsequent admission placed him near the crime scene at around the time Williams likely was killed.

Booker contends that he was arrested earlier in the day, when Ward and Kelly first gave him Miranda warnings and before he took the polygraph examination, and that probable cause did not exist to arrest him at that time. But Ward and Kelly did nothing to restrain Booker; they only interviewed him and asked him to take a polygraph examination. Booker voluntarily agreed to both the interview and the polygraph because he "wanted to help in any way he could." In these circumstances, Booker was not seized within the meaning of the Fourth Amendment. *See United States v. Burns*, 37 F.3d 276, 279 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2592 (1995). Though Booker focuses on the fact that the detectives and the polygraph examiner gave him Miranda warnings, the mere giving of such warnings even when not required does not transform noncustodial questioning into nonconsensual custodial interrogation. *Sprosty v. Buchler*, 79 F.3d 635, 642 (7th Cir. 1996), *petition for cert. filed* (June 21, 1996) (No. 95-9393).

In short, Ward and Kelly had physical evidence indicating that Williams' killer knew her and killed her in a rage, that Williams falsely had told Booker that she had had a miscarriage, and that Booker had lied about his whereabouts at the time Williams was killed. These facts were sufficient for a prudent person to believe that Booker had committed the murder. *See Jones*, 45 F.3d at 181. We conclude that the district court properly granted the detectives' summary judgment motion. We therefore need not address whethee Ward and Kelly were entitled to qualified immunity for their actions.

CONCLUSION

For the foregoing reasons, we affirm the district court's orders granting Owens' and Lewis' motion to dismiss, and Kelly's and Ward's motion for summary judgment.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

CHARLES BOOKER

Plaintiff-Appellant,

v.

JAMES WARD and THOMAS KELLY,
Chicago Police Detectives,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4602 **William T. Hart,** *Judge.*

[August 29, 1999]

JUDGMENT — ORAL ARGUMENT

Honorable William J. Bauer, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

The judgment of the District Court is AFFIRMED with costs in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES BOOKER

Plaintiff,

No. 90 C 4602 *v.*

JAMES WARD and THOMAS KELLY,
CITY OF CHICAGO, A MUNICIPAL CORPORATION,
WILLIAM OWENS, TORRENCE LEWIS,
INGE FRYLKAND, FRANK MARINO
AND BRIAN FLAHERTY

Defendants.

MEMORANDUM OPINON AND ORDER

I. INTRODUCTION

Plaintiff Charles Booker was tried before a jury for the August 7, 1987 murder of his girl friend, Lucy Williams. He was found guilty and subsequently sentenced to 30 years imprisonment in the Illinois Department of Corrections. His conviction was reversed and remanded for further proceedings by the Illinois Appellate Court. *People v. Booker,* 209 Ill. App. 3d 384, 568 N.E.2d 211 (1991). Prior to the reversal of his conviction, Booker brought this suit, pursuant to 42 U.S.C. § 1983, against several of the people involved in his trial. Of these defendants, the following five have moved for summary judgment: John Ouska, William Kopec, Frank Marino, Brian Flaherty, and Inge Frykland.[1] After receipt of this motion, plaintiff conceded that defendants John Ouska and William

---

1. The other three named defendants, James Ward, Thomas Kelly, and Steven Glynn, earlier moved to stay the proceedings against them until disposition of this summary judgment motion. Their motion for a stay was granted.

Kopec, the assistant state's attorneys who prosecuted plaintiff, were immune from suit. *See Imbler v. Pachtman*, 424 U.S. 409 (1976). Therefore, plaintiff's motion to voluntarily dismiss defendants Ouska and Kopec is granted.

Defendants Frykland, Marino, and Flaherty remain and also argue immunity. Frykland is an assistant state's attorney who testified against plaintiff at trial; Marino and Flaherty are the assistant public defenders who defended plaintiff.

II. SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment is to determine whether a trial will be necessary. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson. v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Conversely, when confronted with a motion for summary judgment, the party who bears the burden of proof on a particular issue must affirmatively demonstrate that there is a *genuine* issue of material fact. *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1363 (7th Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S.317 (1986). When presented with a motion for summary judgment, a court must examine the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Bowyer v. United States Dept. of Air Force*, 804 F.2d 428, 430 (7th Cir. 1986).

III. DISCUSSION

Frykland argues that she has absolute immunity concerning her testimony at plaintiff's trial. *See Briscoe v. La Hue*, 460 U.S. 325 (1983). Plaintiff concedes that this is true, and therefore, defendant Frykland is dismissed from this suit.

As to the two remaining moving defendants, Marino and Flaherty, plaintiff alleges that they conspired with the police and state's attorneys to convict plaintiff. Generally, public defenders are

immune from § 1983 suits because they are not "state actors." *Polk County v. Dodson*, 454 U.S. 354 (1981). An otherwise private person, however, acts "under color of state law" it they conspire with a state actor to deprive another of his constitutional rights. *Tower v. Glover*, 467 U.S. 514 (1984); *see also Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985). To establish a conspiracy, plaintiff must demonstrate that Marino, Flaherty, and the state actors "somehow reached an understanding to deny [plaintiff his] constitutional rights." *Moore*, 754 F.2d at 1352. Such a conspiracy may be demonstrated by circumstantial evidence. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979). On summary judgment, however, mere allegations that a defendant made certain statements, without any other proof of conspiracy, is insufficient to sustain a conspiracy claim. *Moore*, 754 F.2d at 1352.

Here, plaintiff presents no facts from which a conspiracy may be inferred. Plaintiff merely asserts that defendants' actions were made in furtherance of an alleged conspiracy with no facts to substantiate that a conspiracy existed. Although plaintiff states that he supports his cross-motion with "sworn affidavits," all affidavits submitted in support are his own. On the other hand, defendants amply support their motion for summary judgment. The record, submitted by defendants, reveals that Marino and Flaherty moved to quash Booker's arrest[2] and to suppress inculpatory statements that Booker made to the police. Additionally, at trial, they objected to the admission of Booker's statements and to the admission of an inflammatory photograph depicting the victim. Without Marino and Flaherty's work on behalf of plaintiff — the filing and arguing of pretrial motions and the making of contemporaneous objections at trial — the reversal of Booker's conviction would not have been possible.

Looking at all of the evidence presented in a light most favorable to plaintiff's claim and drawing all reasonable inferences in

---

2. In reversing Booker's conviction, the appellate court held that Booker was seized, within the meaning of the Fourth Amendment, prior to his formal arrest and that probable cause did nor exist for Booker's arrest.

plaintiff's favor, defendants' motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

IT IS THEREFORE ORDERED that:

(1) Plaintiff's Motion to Voluntarily Dismiss defendants John Ouska and William Kopec is granted.

(2) Defendants Frank Marino, Brian Flaherty, and Inge Frykland's Motion for Summary Judgment is granted. The Clerk of the Court is ordered to dismiss defendants Frank Marino, Brian Flaherty, and Inge Frykland from this case.

(3) Plaintiff's Cross-Motion for Summary Judgment is denied.

(4) The stay of proceedings against defendants James Ward, Thomas Kelly, and Steven Glynn is lifted.

(5) Defendants Ward, Kelly and Glynn are ordered to answer, or otherwise plead, by October 9, 1991.

(6) Status hearing set for October 9, 1991 at 9:15 a.m.

Dated: September 27, 1991

/s/ William T. Hart
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES BOOKER

Plaintiff,

No. 90 C 4602 *v.*

JAMES WARD and THOMAS KELLY,
CITY OF CHICAGO, A MUNICIPAL CORPORATION,
WILLIAM OWENS AND TORRENCE LEWIS,

Defendants.

MEMORANDUM OPINON AND ORDER

Plaintiff Charles Booker brings this action against defendants City of Chicago and four Chicago police detectives, James Ward, Thomas Kelly, William Owens, and Torrence Lewis. The Amended Complaint contains two counts. Count I is a claim pursuant to 42 U.S.C. §1983 in which it is alleged that the four detectives[1] are responsible for arresting him without probable cause. Count II is a state law claim for malicious prosecution against the City, Kelly, and Ward. Defendants have moved to dismiss certain claims. Owens and Lewis, who were not named as defendants until the amended complaint was filed in February 1995, contend that Count I is untimely as to them. The City, Kelly, and Ward contend that Count II fails to state a claim because plaintiff does not satisfy the requirement that the state law proceeding be terminated in a manner indicative of his innocence.

On a motion to dismiss, all the well-pleaded allegations of the complaint are taken as true and all possible inferences are drawn in plaintiff's favor. *Thompson v. Boars,* 33 F.3d 847, 852 (7th Cir.

---

1. Defendant Steven Glynn was previously dismissed from this case and plaintiff has clarified that the City is not intended to be a defendant to Count I.

1994), *cert. denied*, 115 S. Ct. ___ (April 17, 1995); *City National Bank of Florida v. Checkers, Simon & Rosner*, 32 F.3d 277, 281 (7th Cir. 1994). "A complaint need not narrate all relevant facts or recite the law, all it has to do is set out a claim for relief." *Brubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). On the other hand, a court is not "required "to ignore any facts set forth in the complaint that undermine the plaintiffs claim or assign any weight to unsupported conclusions of law." *Checkers*, 32 F.3d at 281 (quoting *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2421 (1993)). Although not alleged in the amended complaint, the parties agree that judicial notice may be taken of the state court rulings in plaintiff's related criminal proceedings. *See Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied*, 469 U.S. 830 (1984); *Dobiecki v. Palacios*, 829 F. Supp. 229, 232 (N.D. Ill. 1993); C.A. Wright & A. Miller, *Federal Practice & Procedure* §1363 at 464-65 (2d ed. 1990).

For purposes of the motions to dismiss, the facts are as follows. On August 7, 1987, Booker learned that his fiancee had been murdered. Booker proceeded to the home of his fiancee, where he spoke with defendants Owens and Lewis. Booker agreed to go to the police station with those officers, arriving at the police station around 11:30 a.m. Booker remained in a waiting area until about 2:00 p.m. At one point during that wait, Owens and/or Lewis inspected his hands, fingernails, shoes, feet, and ankles. At 2:00 p.m., defendants Kelly and Ward interrogated him and took him to police headquarters for a polygraph examination. Booker failed the polygraph test. After the results of the examination became known, Booker was formally placed under arrest. Booker subsequently gave statements that he had murdered his fiancee.

Booker was tried in the Circuit Court of Cook County, Illinois. At pretrial proceedings, Booker challenged the admissibility of his post-arrest statements on the ground that he had been arrested without probable cause. The trial court indicated there had not initially been probable cause to arrest him on the murder charges. However, it found that, following the polygraph results and an admission that Booker had falsely told the officers he had not been in the area of his fiancee's house the night of the murder, there was probable cause to arrest Booker for obstruction of justice charges. The trial court held that the existence of probable cause on those

charges supported the arrest even if the officers had not subjectively relied on such charges. Booker's motion to suppress the statements was denied. Following trial before a jury, Booker was found guilty of murdering his fiancee and was sentenced to 30 years' imprisonment.

Booker appealed his conviction. In an opinion dated January 25, 1991, the Illinois Appellate Court reversed Booker's conviction and remanded the case for further proceedings. See *People v. Booker*, 209 Ill. App. 3d 384, 568 N.E.2d 211 (1st Dist. 1991) ("*Booker I*"). The Appellate Court held that, at sometime between 11:30 a.m. and 2:00 p.m. while Booker was waiting at the police station (that is, before his formal arrests) his voluntary presence at the police station became an involuntary arrest. *Id.* at 217-218. It was further held that, as of that time, probable cause did not exist to arrest him on murder charges. *Id.* at 218. Alternatively, it was held that probable cause did not exist as of the time he was formally placed under arrest. *Id.* The trial court's reliance on there being probable cause to arrest Booker on an obstruction of justice charge was rejected on the ground that Booker was actually arrested prior to the polygraph examination or his admission that he had initially been untruthful about his whereabouts. *Id.* Alternatively, it was held that there was insufficient evidence to support probable cause for obstruction of justice and that, in any event, the arrest could not be justified by charges not relied upon by the police officers. *Id.* The Appellate Court, however, was unable to determine whether Booker's statements should be considered fruits of an unlawful arrest, an issue that had not been reached below because the trial court had found there was a lawful arrest. The prosecution had sought to present evidence that the statements were not causally related to the arrest, but the trial court declined to hear such evidence on the ground that the evidence already submitted had shown that the arrest was lawful. The Appellate Court, therefore, remanded the case for an "attenuation hearing" to determine whether any facts existed showing a break in any chain between the arrest and the statements. *Id.* at 218-19.

Following the remand, the trial court heard further evidence. The trial court found that the statements were attenuated from the arrest because of the intervening circumstance of Booker being informed that his alibi was false. At his fiancee's home, Booker had told the officers that he had stayed at another girlfriend's house

the night that his fiancee was murdered. That girlfriend, however, had told the police that Booker had not stayed there. The trial court again held that the statements were admissible and the conviction was reinstated. As a result of a second appeal, the Appellate Court held that the trial court's findings were against the manifest weight of the evidence because the alibi and denial had been obtained as a result of an arrest without probable cause that had occurred prior to the formal arrest and the evidence could not be a basis for finding the statements attenuated. *People v. Booker*, No. 92-0956, unpublished order at 9-11 (1st Dist., Ill. App. Ct. Feb. 25, 1994) ("*Booker II*"). On October 11, 1994, the trial court dismissed the charges upon the prosecution's motion for a *nolle prossequi* order.

The first question to be resolved is when plaintiff's claims under §1983 accrued for purposes of applying the applicable two year statute of limitations. In order to resolve this question, it is necessary to identify the nature of the §1983 claim. Here the claim is for false arrest in violation of the Fourth Amendment because probable cause did not exist to detain plaintiff.

Central to the statute of limitations argument made by Owens and Lewis is key language in a recent Supreme Court decision, *Heck v. Humphrey*, 114 S. Ct. 2364 (1994). The Supreme Court stated:

> We hold that in order to recover damages for . . . harm caused by actions whose unlawfulness would render a conviction or sentence invalid,[fn6] a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254 . . . [T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; . . . [I]f the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed,[fn7] . . .

> fn 6. One example of this . . . — a §1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful—would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a lawful arrest. [Citations omitted.] He then brings a §1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this §1983 action, he would have to negate an element of the offense of which he has been convicted . . .
>
> fn7. For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, [citations omitted], and especially harmless error, [citation omitted], such a §1983 action even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the §1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, [citations omitted], which we hold today does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Id. at at 2372 & nn. 6-7 (emphasis in original).

Plaintiff contends success on the arrest without probable cause claim would necessarily imply that his previously existing conviction was invalid because it would have implied that his statements were based on an unlawful arrest and therefore not admissible. Therefore, he contends that he could not bring this claim until after his conviction had been vacated by the trial court in October 1994. Defendants focus on the language of footnote 7 and contend that a successful challenge to the lawfulness of his arrest does not "necessarily imply"

the invalidity of the conviction because the conviction could still have been upheld on the ground that the statements were attenuated from the arrest or there may have still been other evidence to support his conviction. Therefore, they contend that the claim accrued when Booker was arrested in August 1987.[2] Alternatively, defendants contend that the claim accrued in January 1991 when the Illinois Appellate Court first reversed the conviction.

The application of *Heck* to unlawful arrest and unlawful search or seizure[3] claims has varied. Some courts have held, without expressly considering footnote 7 of *Heck*, that finding for a plaintiff on a Fourth Amendment claim necessarily implies the invalidity of the related criminal proceeding. *See Jackson v. Vannov*, 49 F.3d 175, 177 (5th Cir. 1995) (per curiam); *Seaton v. Kato*, 1995 WL 88956 *5 (N.D. Ill. March 1, 1995) (noting that the Illinois Appellate Court had vacated the conviction upon holding that the arrest was unlawful and the related confession should have been suppressed); *Jackson v. Ludvick*, 199S WL 42256 *1 (S.D.N.Y. Feb. 2, 1996) (false arrest claim).[4] *See also Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam) ("if [claimant] is convicted and evidence is presented by the prosecution at his criminal trial which is a direct or indirect product of one or more of his arrests, then his section 1983 damage claims challenging the validity of his arrests would appear to undermine the

---

2. At the time, Illinois law provided that the running of limitations periods were tolled for persons who were imprisoned on criminal charges. See Ill. Rev. Stat. ch. 110, par. 13-211 (now codified as amended 735 ILCS 5/13-211). The tolling provision for incarcerated individuals was deleted effective January 1, 1991. Therefore, if defendants are correct, plaintiff needed to bring his claim by January 4, 1993 (the first court day after the New Year's Day holiday).

3. For purposes of applying *Heck*, unlawful search or seizure claims are legally similar to unlawful arrest claims in that, in the criminal case, they often are related to questions of suppressing evidence. For convenience, the term "Fourth Amendment claims" will be used to refer jointly to unlawful search, unlawful seizure, and unlawful arrest claims.

4. *Ludvick* cites footnote 7 in regard to an unlawful search claim, but does not consider it in regard to the false arrest claim.

validity of his conviction and hence be barred by *Heck*"). One court cited footnote 7 of *Heck*, but relied on the state court's actual reversal of convictions based on suppression of evidence to hold that the Fourth Amendment claims necessarily implied the invalidity of the conviction. *See Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiae). *Cf. Seaton*, 1995 WL 88956 at *5. Other courts, citing footnote 7 of *Heck*, indicate that an unlawful arrest claim does not accrue at the time of the arrest unless it is shown that a finding of unlawful arrest would be harmless error or would otherwise not affect the related conviction. *See Lowman v. Town of Concord*, 1995 WL 108224 *2 (W.D.N.Y. March 7, 1995); *Williams v. Hutchens*, 870 F. Supp. 857, 864 n.5 (N.D. Ill. 1994). *See also Cordero v. Bobko*, 1995 WL 221879 *1 (N.D. Ill. April 12, 1995) (since plaintiff had pleaded guilty, unlawfulness of his arrest could not affect the validity of his conviction). Some courts have relied on footnote 7 of *Heck* in apparently holding that the accrual of a claim for an unlawful search cannot possibly be delayed by a pending criminal proceeding. *See Snyder v. City of Alexandria*, 870 F. Supp. 672, 685, 687-88 (E.D. Va. 1994); *Powers v. Sickler*, 1995 WL 146272 *5 (N.D.N.Y. March 31, 1995); *Ludvick*, 1995 WL 42256 at *1. Some courts, citing footnote 7 of *Heck*, indicate that, while there is a pending conviction, the plaintiff cannot obtain damages for having being incarcerated, but the Fourth Amendment claim still accrues as of the time of the unlawful conduct because there are other types of damages that the plaintiff may obtain. See *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (per curiam); *Hutchens*, 870 F. Supp. at 864. *Cf. Ludvick*, 1995 WL 42256 at *1 (no damages for incarceration resulting from unlawful search because having a pending conviction means claim must be dismissed when no other damages alleged); *Olsen v. Correiro*, 1994 WL 548111 *4 (D. Mass. Sept. 26, 1994) (although conviction for murder had been vacated by state court, plaintiff then pleaded guilty to manslaughter and was credited for time served; federal court held plaintiff not entitled to damages for time served on murder conviction that resulted from unlawful conduct, but could obtain damages for other injury if there were any and was entitled to nominal damages). *But cf. Jerricks v. Bresnahan*, 1995 WL 117899 *4 (N.D. Ill. March 15, 1995) (no possible damages for illegal search except those directly related to the underlying criminal conviction and such damages are barred by *Heck* if plaintiff's criminal conviction has not been vacated). Some courts, considering unlawful arrest claims, have distinguished footnote 7 of *Heck* on the ground that unlawful

arrest claims (unlike unlawful search claims) necessarily go to the merits of the conviction,[5] *Powers*, 1995 WL 146272 at *6; *Dawkins v. City of Utica, New York*, 1994 WL 675047 *3 & n.2 (N.D.N.Y. Nov. 28, 1994), or because confessions related to unlawful arrests, unlike evidence found during unlawful searches, cannot be admitted on independent source or inevitable discovery grounds.[6] *Hutchens*, 870 F. Supp. at 864 n.5.

In footnote 6 of *Heck*, 114 S. Ct. at 2372 n.6, the Court gives an example of what it means by claims involving "actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 2372. The example is a criminal offense where the lawfulness of the arrest is itself an element of the offense. That is not the situation in the

---

5. *Powers* and *Dawkins* rely in part on Second Circuit law that a valid conviction precludes a finding that probable cause to arrest did not exist. *See Cameron v. Fogarty*, 806 F.2d 380, 387-88 (2d Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). That, however, is not necessarily the law in the Seventh Circuit. *See King v. Goldsmith*, 897 F.2d 885, 886 (7th Cir. 1990), *cert. denied*, 115 S. Ct. 937 (1995) (citing the split among the circuits and leaving the question open in the Seventh Circuit); *Jerricks v. Bollin*, 1994 WL 117465 *2 (N.D. Ill. March 28, 1994) (following *Cameron*); *Cordero*, 1995 WL 221879 at *1 (holding that question of probable cause to arrest and guilt on a later conviction are distinct). But even if the rule stated in *Cameron* is also the law in this circuit, *Powers* and *Hawkins* rely on a logical error. That a conviction conclusively determines that there was probable cause for an arrest does not have a logical corollary that lack of probable cause to arrest determines there was insufficient evidence to convict so that a challenge to probable cause to arrest must be a challenge to a conviction. *See Goldsmith*, 897 F.2d at 886-87. In other words, A implies B does not have the logical correlation that not-B implies not-A.

6. *Hutchins* indicates that the plaintiff in that case necessarily was challenging the use of his confession. As Booker's case indicates, however, it is possible to give statements subsequent to an unlawful arrest that are still admissible because attenuated from the arrest. *See generally United States v. Fazio*, 914 F.2d 950, 957-58 (7th Cir. 1990). Also, not every unlawful arrest and conviction involves incriminating statements being made to the police while the suspect is in custody.

present case. While the example is not exhaustive of what might constitute such an action, it implies that the Supreme Court was not referring to federal causes of action that merely had overlapping evidentiary issues with related criminal proceedings. Footnote 7 of *Heck*, 114 S. Ct. at 2372 n.7, indicates that federal causes of action that are related to suppression of evidence issues in the criminal proceeding would never be a cause of action that cannot exist while a valid conviction is pending. That footnote states that, because of rules like independent source and harmless error (and in the present case attenuation), such causes of action "would not" necessarily imply the invalidity of a conviction. The Supreme Court did not say "might not" or "may not," it said "would not." Also, there is no indication by the Supreme Court that the particular circumstances of the criminal case are to be considered. *Heck*, therefore, should be read as holding that there is an absolute rule that §1983 claims that are merely related to admissibility of evidence issues in criminal from accruing because of the existence of a pending conviction.[7] *See Heck*, 114 S. Ct. at 2372 n.7; *Snyder*, 870 F. Supp. at 685, 687-88; *Powers*,

---

7. To hold otherwise, as have cases such as *Woods*, 47 F.3d at 546, and apparently *Seaton*, 1995 WL 88956 at *5, would require that the plaintiff speculate at the time of the allegedly unlawful conduct (or within the applicable limitation period) whether success on the claim would undermine a conviction or instead be held to be harmless error or otherwise of no effect on the conviction. In the present case, it was more than six years after the allegedly unlawful arrest before it was finally determined in the state proceedings that the arrest was without probable cause and the statements were connected with the illegal arrest. If the Appellate Court had instead affirmed the trial court's finding of attenuation, it would have been too late to then file the false arrest claim which (under the *Woods* and *Seaton* analysis) would then be deemed to have accrued when Booker was first arrested.

If a litigant were to seek to protect himself or herself by filing a §1983 suit within two years of an arrest while simultaneously pursuing a challenge to the related conviction based on statements derived through the unlawful arrest, he or she would be forced to argue in the §1983 suit that the unlawful arrest would not affect his conviction while taking the contrary position in the criminal litigation. The Supreme Court did not intend to place a litigant in that situation.

1995 WL 146272 at *5; *Ludvick*, 1995 WL 42256 at *1. While no damages for having been incarcerated can be obtained until the conviction is vacated, the claim accrues when the unlawful conduct occurs and the plaintiff is entitled to damages for whatever other injuries he or she may have suffered.[8] *See Heck*, 114 S. Ct. at 2372 n.7; *Trimble*, 49 F.3d at 585; *Hutchens*, 870 F. Supp. at 864. *Cf. Ludvick*, 1995 WL 42256 at *1; *Olsen*, 1994 WL 54811 at *4.

Applying this rule to the present case, plaintiff's Count I arrest without probable cause claim accrued in August 1987[9] and the statute of limitations on that claim expired in January 1993, two years after the statutory tolling provision for imprisoned convicts was deleted from Illinois law.[10] Therefore, plaintiff's February 1995 attempt to

---

8. This rule means that a plaintiff who is ultimately successful in challenging his criminal conviction may have to bring his §1983 suit for an unlawful arrest, search, or seizure prior to being able to obtain the full amount of his damages. It also means that the court hearing the civil suit may be considering Fourth Amendment claims that are also before the court hearing the criminal case. Therefore it may often be appropriate to stay proceedings or abstain in the §1983 suit while challenges to the criminal conviction are pending.

9. Although the Amended Complaint only expressly seeks damages for imprisonment resulting from the allegedly unlawful arrest, damages that could not have been obtained while there was a pending conviction, plaintiff also could seek damages for the time he was detained prior to when he could properly have been arrested or he could have sought nominal damages. *See Davet v. Maccarone*, 973 F.2d 22, 29 (1st Cir. 1992); *Raysor v. Port Authority of New York & New Jersey*, 768 F.2d 34, 39 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986); *United Steelworkers of America v. Milstead*, 705 F. Supp. 1426, 1439 (D. Ariz. 1988).

10. Plaintiff filed his suit pro se in August 1990. In October 1991, counsel was appointed to represent him. In February 1992, the case was dismissed with leave to reinstate within 60 days after disposition of the state court proceedings. The case was reinstated in November 1994 and the amended complaint naming Owens and Lewis was filed in February 1995. Arguably, the statute of limitations was tolled during the time the case was dismissed. *See Heck v. Humphrey*, 997 F.2d 335 (7th Cir. 1993), *aff'd on other grounds*, 114 S. Ct. 2364 (1994). But even if that tolling rule would otherwise apply, it does not apply because of a lack of diligence during the 18 months the case was

add Owens and Lewis as defendants was untimely. The claims against those defendants will be dismissed.

The other three defendants seek to dismiss the Count II state law malicious prosecution claim on the ground that Booker's criminal proceedings was not terminated in a manner indicative of innocence. The parties agree that termination of the criminal proceeding in favor of Booker is an element of his malicious prosecution claim, *Pobiecki*, 829 F. Supp. at 234 quoting *King v. Avila*, 760 F. Supp. 681, 683 (N.D. Ill. 1989)), and that the *nolle prosequi* order in the criminal proceeding was a termination in Booker's favor. The parties also agree that success on this claim requires that the termination of the criminal proceeding be indicative of innocence; that dismissing the criminal case in a manner that leaves the question of the defendant's innocence unresolved is insufficient. *Dobiecki*, 829 F. Supp. at 235. Further, the parties agree that determining whether the dismissal was indicative of innocence turns on the question of whether excluding Booker's statements should be considered to be based on the unreliability of that evidence. The parties agree that *Dobiecki*, 829 F. Supp. at 235-36, accurately states the law in Illinois:

> The better rule is that the particular circumstances of each case must be considered to determine whether the dismissal following suppression of evidence should be considered indicative of innocence. *See [Union Oil of California v.] Watson*, 468 So. 2d [349,] 353 t(Fla. Dist. Ct. App.), *review denied*, 479 So. 2d 119 (Flat 1985)]. If the circumstances show that unreliable evidence has been suppressed and the prosecution then abandons the case because of lack of sufficient reliable evidence, that would be a circumstance

---

pending before it was dismissed. Owens's and Lewis's participation was known well before February 1992; they testified in the trial court before the civil case was filed and are specifically mentioned in *Booker I*, which was decided in January 1991. Since plaintiff did not act diligently in adding these defendants before the case was first dismissed, equitable tolling cannot apply. *See generally, Heck*, 997 F.2d at 357 (requiring diligence during all pertinent proceedings).

where the dismissal is indicative of innocence, just as any dismissal for lack of proof is generally considered indicative of innocence. *See Bryant v. Whalen*, 759 F. Supp. [410], 419 t(N.D. Ill. 1991)]; *Wynne v. Rosen*, 391 Mass. 797, 464 N.E.2d 1348, 1351 (1984).

If a confession is suppressed because involuntarily coerced, then the evidence was not reliable and a subsequent voluntary dismissal based on lack of evidence would be indicative of innocence.

On the other hand, if the evidence was only suppressed on "technical" grounds having no or little relation to the evidence's trustworthiness, then the fact that there was not other sufficient evidence would not be indicative of innocence. *Cf. Rich v. Baldwin*, 133 Ill. App. ad 712, 479 N.E.2d 361, 365 (5th Dist. 1985); *Brvant*, 759 F. Supp. at 419; *Wynne*, 464 N.E.2d at 1351; *Scannell v. Riverside County*, 152 Cal. App. 3d 596, 199 Cal. Rptr. 644, 652 (1984); *Watson*, 468 So. 2d at 353.

Plaintiff contends that suppression of a statement that is causally related to an illegal arrest is necessarily based on involuntariness because the voluntariness of a statement is a consideration in attenuation analysis. However, the exclusionary rule that prohibits the use of evidence causally related to an arrest without probable cause is a prophylactic rule "whose "prime purpose is to deter future unlawful conduct" by police officers. *United States v. Fazio*, 914 F.2d 950, 957 (7th Cir. 1990) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). It does not necessarily follow that a statement that is a fruit of an arrest without probable cause is involuntary. Voluntariness of the statement is a consideration in determining whether the statement is attenuated from the police misconduct. However, a number of factors are considered, with the voluntariness of the statement being a "threshold requirement" for finding the statement to be attenuated from the police misconduct. *Fazio*, 914 F.2d at 957 (quoting *Brown v. Illinois*, 422 U.S. 590, 604 (1975)). Thus, a statement being voluntary is a necessary requirement for finding the statement to be attenuated, but it is not a sufficient requirement. *Id.; United States v. Patino*, 862 F.2d 128, 132 (7th Cir. 1988), *cert. denied*, 490 U.S. 1069 (1989). A voluntary statement will still be suppressed if the other factors go against finding the statement to be attenuated from the police misconduct. *Cf. People v. Roeniecki*, 135 Ill. App. 3d 394,

481 N.E.2d 973, 980 (2d Dist. 1985) (voluntary consent to search); *United States v. Klopfenstine*, 673 F. Supp. 356, 360 (W.D. Mo. 1987) (same). One One of the factors to be considered is the presence of an intervening circumstance. *See Fazio*, 914 F.2d at 957 (quoting *Patina*, 862 F.2d at 132).

In Booker's criminal proceeding, the Illinois Appellate Court held that Booker's statements were not attenuated from the illegal arrest primarily because there were no intervening circumstances between the illegal arrest and his statements. *Booker II* at 10. The Appellate Court held that any intervening circumstance is the most important factor to consider in attenuation analysis. *Id.* (citing *People v. Beamon*, 255 Ill. App. 3d 63, 627 N.E.2d 316, 319 (1st Dist. 1993)). It did not even consider whether the statements were voluntary. Since Booker's criminal proceeding was dismissed without any finding that his statements were involuntary, there is no basis for considering his statements to have been unreliable. Therefore, the dismissal following suppression of the statements is not indicative of innocence since, with the statements, there would have been sufficient evidence to proceed to trial.

Since plaintiff cannot satisfy the requirement of having had his criminal proceeding dismissed in a manner indicative of his innocence, Count II will be dismissed. Since that is the only claim against the City, the City will be dismissed from the case.

This case remains before the court on the charges of arrest without probable cause in violation of the Fourth Amendment. Plaintiff may seek to recover damages for improper detention during the period prior to his arraignment. *Heck*, 114 S. Ct. at 2371; *High v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992). The remaining defendants are not bound by the decisions of the Illinois Appellate Court in *Booker I* and *Booker II;* they may defend plaintiff's claim by seeking to show under federal law that there was probable cause to arrest plaintiff.

IT IS THEREFORE ORDERED that defendants' motions to dismiss [69, 70, 78] are granted. Count II of the amended complaint is dismissed and defendants City of Chicago, William Owens, and

Torrence Lewis are dismissed from the case. Defendants shall answer the remaining allegations of the amended complaint by May 24, 1995. Previously set status hearing of June 5, 1995 at 9:15 a.m. will stand.

Dated: May 9, 1991

/s/ William T. Hart
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES BOOKER

Plaintiff,

No. 90 C 4602 *v.*

JAMES WARD and THOMAS KELLY,
CITY OF CHICAGO, A MUNICIPAL CORPORATION,
WILLIAM OWENS AND TORRENCE LEWIS,

Defendants.

MEMORANDUM OPINON AND ORDER

Plaintiff Charles Booker claims that defendants Thomas Kelly and James Ward, Chicago police detectives, lacked probable cause when, on August 7, 1987, they arrested him for the murder of Lucy Williams. An Illinois court so held in Booker's criminal prosecution, *See People v. Booker,* 209 Ill. App. ad 384, 568 N.E.2d 211, 218 (1st Dist. 1991) *("Booker I").* The Appellate Court remanded the case for a hearing on whether Booker's confession to the murder after his arrest was admissible. In a second appeal, after the trial court held that it was, the Appellate Court again reversed. holding the confession was obtained as a result of the unlawful arrest. *People v. Booker,* No. 92-0956, unpublished (1st Dist. 1994) ("Booker II"). Defendants were not parties to that case, and it is undisputed that they are not bound by the Appellate Court holdings. *See Kraushaar v. Flanigan,* 45 F.3d 1040, 1050-51 (7th Cir. 1995); *Booker v. Ward,* 888 F. Supp. 869, 877 (N.D. Ill. 199S).

Defendants have moved for summary judgment on the ground that the undisputed facts show they had probable cause for the arrest. Alternatively, they contend they have qualified immunity because the law was not clear that the facts of which they had knowledge were not sufficient to constitute probable cause or because any mistake they made regarding the existence of probable cause was reasonable in light of the then established law. Plaintiff contends there are disputed facts regarding when he was arrested and further contends that, construing the evidence in his favor, the

facts known to the police officers when he was arrested were insufficient to support probable cause or qualified immunity.

This case is complicated by the question of whether the defendants, rather than other officers, can be responsible or liable for the arrest of plaintiff if that arrest occurred before they formally placed him under arrest. The questions to be resolved are whether factual issues exist (1) with respect to defendants' responsibility for plaintiff's arrest before 5:00 p.m. on August 7, 1987 as well as (2) the existence of probable cause to formally arrest plaintiff, and, in any event, (3) whether qualified immunity applies to defendants' conduct with respect to the arrest of plaintiff.

On a motion for summary judgment, the entire record is considered with all reasonable inferences drawn in favor of the nonmovant and all factual disputes resolved in favor of the nonmovant. *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988); *Jakubiec v. Cities Service Co.*, 844 F.2d 470, 471 (7th Cir. 1988). The burden of establishing a lack of any genuine issue of material fact rests on the movant. *Id.* at 473. The nonmovant, however, must make a showing sufficient to establish any essential element for which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant need not provide affidavits or deposition testimony showing the nonexistence of such essential elements. *Id.* at 324. Also, it is not sufficient to show evidence of purportedly disputed facts if those facts are not plausible in light of the entire record. *See Covalt v. Carey Canada, Inc.*, 950 F.2d 481, 485 (7th Cir. 1991); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476-77 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988). As the Seventh Circuit has summarized:

> The moving party bears the initial burden of directing the district court to the determinative issues and the available evidence that pertains to each. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *id.* at 325 ("the burden on the moving party may

> be discharged by 'showing'—that is, pointing out to the district court--that there is an absence of evidence to l support the nonmoving party's case"). Then, with respect to issues that the non-moving party will bear the burden of proving at trial, the non-moving party must come forward with affidavits, depositions, answers to interrogatories or admissions and designate specific facts which establish that there is a genuine issue for trial. Id. at 324. The non-moving party cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue. Id. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Core.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the t non-moving party]." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 252 (1986).

Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992).

Plaintiff brings a false arrest claim pursuant to 42 U.S.C. §1983. In order to succeed on this claim, the burden is on plaintiff to prove that he was arrested without probable cause. In determining whether there was probable cause for an arrest, it must be considered

> whether "the facts and circumstances within the officer['s] knowledge and of which [he] had reasonably trustworthy information were - sufficient to warrant a prudent person in believing that an offense has been committed." *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1939), *cert. denied*, 495 U.S. 931 (1990). "Probable cause requires more than bare suspicion, but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false." *Id.*

Maltby v. Winston, 36 F.3d 548, 556 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995). *Accord United States v. Garza-*

Hernandez, 623 F.2d 496, 499 (7th Cir. 1980). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Gilbert*, 45 F.3d 1163, 1166 (7th Cir. 1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)). *Accord Gramenos v. Jewel Cos.*, 797 F.2d 432, 39 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987). "In recognition of the endless scenarios confronting police officers in their daily regimen, courts evaluate probable cause 'not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person in the position of the arresting officer—seeing what he saw, hearing what he heard.'" *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1246 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 937 (1995) (quoting *Mahoney v. Kesery*, 976 F.2d 1054, 1057 (7th Cir. 1992)).

Although considered subjectively in terms of the facts the officer would have had before him or her, whether those facts constituted probable cause is an objective standard based on a reasonable police officer; whether the police officer actually believed he or she had probable cause or had other motives (good or bad) for arresting the person are not considerations. *Sheik-Abdi*, 37 F.3d at 1247; *Mark v. Furay*, 769 F.2d 1266, 1269 (7th Cir. 1985); *United States v. Marin*, 761 F.2d 426, 432 (7th Cir. 1985) (citing *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983))

Drawing all reasonable inferences and resolving all disputes in plaintiff's favor, the facts are as follows. On the morning of August 7, 1987, Lucy Williams's body was found behind 7108 South Cottage Grove in the City of Chicago. Ward and Kelly were assigned to investigate and arrived at the scene at 8:45 a.m. Williams's body was alongside her car with the car door open. She was in business attire, but her pants and underwear were pulled down to her ankles and a car mat covered her groin area. Her purse was not in her car or near her body and was not located during the initial investigation. Williams had been beaten extensively about the head and blood was splattered in the car, alongside it, and on one side of the car. There was a tooth on the car seat that was never identified.

The physical evidence indicated that Williams had been beaten for a protracted period of time. It would have been reasonable for the officers to conclude that the physical evidence indicated a crime

of passion committed by someone who was angry or in a rage. Also, they could have reasonably concluded that a person who had randomly killed and possibly raped Williams would not have been concerned with her genital area being exposed and therefore would not have covered her groin area with the car mat. Thus, it would also have been reasonable to surmise that the evidence indicated that the killer was someone who knew Williams. There were no bruises in her genital area and no evident semen.

Given the overkill evident from the numerous head wounds and the lack of bruising in the genital area, a reasonable officer could have concluded that, despite her pants being pulled down, it was unlikely that the assault was sexual in nature, but instead was probably an act of rage by someone who knew Williams and was angry with her. Although the officers could have reasonably concluded from the physical evidence that Williams likely knew her murderer; there was no physical evidence pointing to plaintiff in particular.

There was also evidence at the scene of the crime that indicated the attack (or at least a confrontation) had likely been planned by someone who had been there waiting for Williams to go to her car in the morning. One of the tires on Williams's car was flat and had a piece of metal in it, indicating that it may have been flattened in anticipation of Williams's arrival. A beer can in a brown bag was found resting at the bottom of a stairwell near the one leading to Williams's apartment. However, there was also a beer can further up the stairwell which could indicate the cans were merely there because a resident had been drinking on the back stairs.

Defendants interviewed a number of people at the crime scene, including relatives and neighbors of Williams. They interviewed Williams's 6-year-old son Curtis who lived with her. He said that, during the evening of August 6, Williams had gone 1 out with Howard Oliver, a former boyfriend, but had returned at 8:30 p.m. He had last seen her alone in bed at 10:30 that night. A neighbor had heard a scream between 4:00 and 4:30 a.m. and the parties agree it could have reasonably been assumed that this was the time of the murder. Ward testified that Curtis told him Williams normally left for work at 4:00 a.m. However, this fact was not included in the police report summarizing the interview of Curtis. Also, Booker testified that Williams's hours were variable. However, in par. 12 of Plaintiff's Local Rule 12(N) Statement, plaintiff

concedes that Kelly drew the conclusion that the killer likely knew Williams's work schedule and was waiting for her to come to her car.

Plaintiff argues that the detectives each had less than one year's experience as a detective (plaintiff ignores that they had 16 and 8 years' experience as police officers before becoming detectives) and that it can be inferred from the record that neither detective actually drew the aforementioned conclusions prior to plaintiff's arrest. Probable cause, however, is not determined on the basis of the actual, subjective reasoning of the police officer making the arrest, but is based on what a reasonably well trained police officer could have reasonably surmised had he or she observed and known what the actual arresting officer observed and knew. *See United States v. Sleet*, 54 F.3d 303, 307 (7th 1995) (quoting *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)); *Haltby*, 36 F.3d at 555.

On the morning of August 7, Booker received a telephone call at about 8:30 a.m. from a person at Williams's place of employment inquiring about her absence. Booker called Williams's home and was informed she had been killed. He then went to her apartment. Shortly after arriving, Booker indicated that he wanted to leave to purchase cigarettes, but a female police officer prevented him from leaving. Later, at Kelly's request, officer Owens asked Booker to go with him to Area One headquarters so he could be questioned about Williams's friends and habits away from her family and where police mug books would be available. Booker was told that he would be driven back to Williams's apartment, where his car was located.

Booker agreed to accompany officers Lewis and Owens, expressing that he wanted to help in any way he could. Booker was not placed in handcuffs nor told he was under arrest. During the trip to Area One, the officers stopped for cigarettes and to purchase a soft drink. They arrived at the station between 11:30 and 11:45 a.m. and Booker waited on the second floor for defendants to arrive. At one point Booker asked why he was being held and the officers told him he was not being held, but directed him to wait for defendants to come. Booker was permitted to use the bathroom and a telephone in the lineup room, though an officer sat at the desk as he used the telephone. Neither Owens nor Lewis expressly told Booker that he was free to 1 leave or free to refuse

to answer questions.

While Booker was waiting, Owens and anther officer examined his fingernails, shoes, and feet for blood. They found nothing. Defendants deny, and there is no proof, that they were told of this examination before they arrested Booker.

While Booker went to Area One and waited there, defendants continued to question neighbors, friends, and relatives of Williams. Williams's cousin Elaine Sims told them that Booker had lived with Williams and that she had asked him to move out only three weeks earlier, telling him she no longer wanted to marry him. Sims also told them that Williams-had been pregnant with Booker's child and had an abortion, but told Booker it was a miscarriage. She did not state that Booker had discovered this lie. Sims also said that Booker was very jealous, a heavy drinker, and often would forget what he had done while drinking. However, she did not state that he was violent or that he had ever threatened to harm Williams. Defendants also interviewed Williams's former husband who said he had last spoken with Williams about 10 days before she died. Approximately fourteen witnesses had been interviewed before defendants returned to the station to interview Booker.

Defendants arrived at Area One between 1:00 and 1:30 p.m., but did not begin interviewing Booker until approximately 2:00 p.m. At that point, Booker was waiting in the lineup room and that is where he was questioned. At the beginning of the questioning, defendants read Booker a standard Miranda warnings form and Booker signed the form. Booker was not expressly told that he was free to leave, but the Miranda warnings advised him of his right to not answer questions. Booker informed the officers that he had talked to Williams approximately 9:00 p.m. on the night before she was killed. He did not mention having any other contact with her that evening (other than an unsuccessful attempt to reach her by phone at approximately 8:00 p.m.), nor did he mention driving past her apartment building that evening or after midnight. Booker related that he had been drinking with friends throughout the evening and that he slept at the home of the girlfriend he was living with. He said he did not leave that home until 7:40 a.m. on August 7 when he left for work. Booker expressly denied knowledge of or participation in the killing of Williams. During the questioning, defendants had police records checked and were

informed that Booker did not have a criminal record.

The officers requested that Booker submit to being fingerprinted and take a polygraph examination at police headquarters. At the time of this request, he was not expressly told that he could refuse or that he could simply leave. Throughout the time at Area One and while being transported to police headquarters, Booker was not handcuffed nor was any physical force used or threatened. At police headquarters, Booker was fingerprinted and then escorted in an elevator to where the polygraph examination was given. The polygraph examiner read Booker a form that repeated the Miranda warning and indicated participation in the examination was voluntary. Booker signed the form, acknowledging that he was voluntarily taking the examination. The examination took place from approximately 3:20 to 4:20 p.m. After the examination, the examiner informed defendants (outside Booker's presence) that it was his opinion that Booker was being untruthful and uncooperative and trying to beat the machine. With defendants' approval, the examiner then informed Booker that he could not pass Booker on the test. Booker subsequently admitted he had lied in that he had driven by Williams's apartment twice during the evening/morning of August 6/7. Defendants then expressly informed Booker he was under arrest at approximately 5:00 p.m. He confessed to the murder during the evening.

Plaintiff contends that he was arrested as of the time that defendants gave him his first set of Miranda warnings at Area One. This was approximately 2:00 p.m. Defendants contend that he was not arrested until expressly informed he was under arrest which was about 5:00 p.m. The only additional incriminating facts learned during the time between these two marking points was that Booker was in the vicinity of Williams's apartment during the evening before/morning of the murder and that he initially lied about not Being there. These two facts are not part of the probable cause determination if plaintiff was already under arrest prior to the follow up questioning after the polygraph examination being completed.

An arrest can occur without a police officer formally announcing that the person is under arrest. Whether a person has been arrested is determined objectively; a person has been arrested "if, in view of all the circumstances surrounding the incident, a reasonable

person would have believed that he was not free to leave." *United States v. Burns*, 37 F.3d 276, 279 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2592 (1995) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)). *Accord United States v. McCarthur*, 6 F.3d 1270, 1275-76 (7th Cir. 1993); *United States v. Lennick*, 917 F.2d 974, 977 (7th Cir. 1990).

> [C]ertain factors have emerged as being probative of whether a reasonable person would have felt free to leave. These include: whether the encounter took place in a public area or whether police removed the person to another location; whether the police informed the person that she was not under arrest and was free to leave; whether police indicated to the person that she was suspected of a crime or was the specific target of police investigation; whether the person was deprived of documents without which she could not continue on her way, such as a driver's license or a train ticket; and whether there was physical touching, display of weapons, or other threatening behavior on the part of police that would communicate to a reasonable person that she was not free to end the encounter.

McCarthur, 6 F.3d at 1276. The length of questioning is also a factor to consider. *Lennick*, 917 F.2d at 977.

The Appellate Court concluded in *Booker I*, that Booker was under arrest prior to 5:00 p.m. Assuming that conclusion to be correct, is his arrest attributable to the conduct of defendants Ward and Kelly? Booker voluntarily went to the crime scene to provide information. He agreed to go to the police station to answer questions. He waited a short period and was questioned for a short period after receiving Miranda warnings. He agreed to take a polygraph test before which he was again given Miranda warnings. These facts are not determinative of custodial questioning. *See Rodgers v. Lincoln Towina Service. Inc.*, 771 F.2d 194, 199 (7th Cir. 19B5); *Feltrop v. Delo*, 46 F.3d 766, 773 (8th Cir. 19i5); *United States v. Cota*, 953 F.2d 753, 758-59 (2d Cir. 1992).

It is undisputed that at one point Booker was told he was not being held, but was simultaneously told to wait for defendants to arrive. There is no evidence, however, that Ward or Kelly knew that Booker had been so informed. While at Area One, Booker

was examined to see if blood had been splattered on him. This included a close examination of his fingers and taking off his shoes. This clearly implied Booker was a possible suspect. Again, however, neither Kelly nor Ward was aware this had happened. Also, although belief that one is a suspect may contribute to a reasonable belief that one is in custody, it is not determinative. *Stansbury v. California*, 114 S. Ct. 1526, 1530 (1994); *United States v. Jones*, 21 F.3d 165, 170 (7th Cir. 1994)

Booker points to the fact that he was given Miranda warnings, contending a reasonable person would interpret that as at least a factor indicating he or she is under arrest. However, in neither *Booker I* nor *Booker II* did the Appellate Court rely on or even refer to the giving of Miranda warnings as indicative of an arrest. Moreover, federal law is that the giving of Miranda warnings is not a basis for finding a person to be in custody. *See Davis v. Allsbrooks*, 778 F.2d 168, 172 (4th Cir. 1985); *United States v. Charles*, 738 F.2d 686, 693 n.6 (5th Cir. 1984); *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977). The giving of Miranda warnings relates to the voluntariness of statements and is encouraged. *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir. 1977) ("The precaution of giving Miranda rights in what is thought could be a non-custodial interview should not be deterred by interpreting the giving of such rights as a restraint on the suspect, converting a non-custodial interview into a custodial interrogation for Miranda purposes.").

The conduct of Ward and Kelly was insufficient to change Booker's voluntary cooperation with the police into an arrest by defendants Ward and Kelly before 5:00 p.m. There is no dispute that Booker's initial trip to the police station was voluntary as the Appellate Court noted. *Booker I*, 568 N.E.2d at 217. The time spent at the police station was not lengthy when it is considered that defendants had to first complete their investigation at a murder scene. The initial interview of Booker lasted no more than an hour and the polygraph examination another hour. Booker, therefore, was not subjected to lengthy questioning. Most importantly, there was no use of or show of force indicating that Booker was not free to go and, at one point, he was actually told that he was free to go. Based on the facts assumed to be true for purposes of summary judgment, no reasonable factfinder could conclude that Booker was placed under arrest by the acts of the defendants before 5:00 p.m.

Cf. Jones, 21 F.3d at 170; *Allsbrooks*, 778 F.2d at 170-72.

The conclusion that Booker was not placed under arrest by defendants prior to 5:00 p.m. is not contrary to the holdings of the Appellate Court in either *Booker I* or *Booker II*. In *Booker I*, the Court only singled out and placed special emphasis on the examination of Booker's hands and feet as indicative of a custodial investigation. Without this incident, for which the defendants were not responsible, it does not appear that the Court would have found an arrest before 5:00 p.m.

The evidence is that Booker was formally arrested by Ward and Kelly after the polygraph examination and his admission that he had lied. Unlike Illinois law, which does not permit polygraph-examination results to be support for probable cause, *see People v. Booker*, 568 N.E.2d at 218, under federal law such results can be considered in determining whether probable cause existed. *See Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 405-06 (5th Cir. 1989); *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990).

At the point of the arrest, the officers had the additional knowledge that Booker had been untruthful about his whereabouts the night/morning of the murder. He had admitted having lied about seeking out Williams that night. Lying in response to police questioning is a strong indicator of guilt, *see United States v. Leung*, 929 F.2d 1204, 1208 (7th Cir.), *cert. denied*, 502 U.S. 906 (1991), particularly when it is lying about an incriminating fact. The evidence supported that Williams's murderer knew her and her work schedule. Booker was one of the few people known to fall into that category. Moreover, he was known to be very jealous, thus providing a motive for the murder. With the additional evidence that he had lied about being in the area the night/morning of the murder, a probability existed that he had committed the murder. The officers, therefore, had probable cause to arrest him and cannot be held liable for a constitutional violation.

Although it does not appear that any material fact is in dispute, even if it were found that there are disputed facts regarding the existence of probable cause, it still must have to be determined whether defendants have qualified immunity. On this issue, plaintiff bears the burden of citing the existence of clearly established authority, on closely analogous facts, which, in August of 1987,

would alert a reasonable police officer that his conduct toward plaintiff was clearly unlawful. *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir.), *cert. denied*, 111 S. Ct. 69 (1990). Qualified immunity analysis is a two step inquiry: whether the law was clearly established and, if so, whether the conduct was objectively reasonable. *Biddle v. Martin*, 992 F.2d 673, 675 (7th Cir. 1993).

Plaintiff points to no existing law with closely analogous facts (prior to *Booker I* in 1991) that would have clearly established that the facts known to defendants would have required them to know that their conduct was unlawful. Plaintiff contends, rather, that the standard for qualified immunity and probable cause are essentially merged and that a factual issue with respect to probable cause would require a trial of both issues. Recent Seventh Circuit authority is to the contrary. *Maltby v. Winston*, 36 F.3d at 557. The standard for qualified immunity is different from the standard for probable cause. In *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1246 (7th Cir. 1994), the Court stated that

> even in cases where there was no probable cause for the arrest, by holding that "if officers of reasonable competence could disagree" on whether there was probable cause, the defendant would be immune from damages liability. In other words, only if no reasonable officer could have mistakenly believed that he had probable cause to arrest is the immunity forfeited.

If probable cause did not exist, the officers are nevertheless entitled to qualified immunity if their mistake as to the existence of probable cause for an arrest was reasonable despite the pertinent law that was clearly established as of the August 1987 incident. *Maltby*, 36 F.3d at 557; *Eversole v. Steele*, 59 F.3d 710, 717-18 (7th Cir. 1995); *Burns v. Reed*, 44 F.3d 524, 529 (7th Cir.), *cert. denied*, 115 S. Ct. 2583 (1995). "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Eversole*, 59 F.3d at 717 (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

If the facts create a dispute as to whether Booker could have reasonably believed he was free to leave, it still has to be considered that Kelly and Ward were not aware of all that had happened prior to their arrival at the police station. They did not

know of officers telling Booker not to leave the scene of the crime and to continue to wait at the police station. They did not know that Booker's fingernails, socks, and feet had been examined. To the extent such facts would be necessary to a finding of being in custody, Kelly and Ward would still be entitled to qualified immunity because, based on the information known to them, they had a reasonable basis for believing Booker was not placed under arrest until they formally placed him under arrest, and that arrest was not unlawful.

Defendants Ward and Kelly are entitled to claim qualified immunity.

Defendants' motion for summary judgment will be granted.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment [94] is granted. The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiff dismissing his cause of action with prejudice.

Dated: October 13, 1995

/s/ William T. Hart
United States District Judge

IN THE ILLINOIS APPELLATE COURT
FIRST DISTRICT, FIFTH DIVISION

PEOPLE OF THE STATE OF LLINOIS

Plaintiff,

-vs-

No. 1-89-0519

CHARLES BOOKER

Defendant.

Jan. 25, 1991.

Justice MURRAY delivered the opinion of the court:

Defendant Charles Booker (Booker) was tried before a jury for the August 7, 1987, murder of his girl friend, Lucy Williams. He was found guilty and subsequently sentenced to 30 years imprisonment in the Illinois Department of Corrections. He now brings this appeal, raising these issues: (1) whether the trial court erred when it denied his motion to quash his arrest and suppress the inculpatory statements he made to police, (2) whether the trial court improperly admitted evidence at trial which it had previously ordered suppressed, and (3) whether he was denied a fair trial because of the improper admission of an inflammatory photograph depicting the victim. For reasons we shall discuss, we reverse Booker's conviction, but remand for further proceedings.

Booker filed two pretrial motions, one to quash arrest and another to suppress statements. Evidence was taken at two hearings and the trial court considered all of the evidence received when it ruled on the two motions. At the hearings on these motions, Booker contended that he was illegally detained or "arrested" prior to the time of his formal arrest. Alternatively, he argued that there was no probable cause to arrest even at the time of his formal arrest. Additionally, he argued that the inculpatory statements he made to the police subsequent to his illegal arrest were tainted and must be suppressed.

The State responded by arguing that Booker had not been illegally detained prior to his formal arrest and that there had been

probable cause for his arrest at that time. As the hearings progressed, however, the State indicated that it would attempt to show that Booker's inculpatory statements need not be suppressed even if the court should find that the arrest had been made without probable cause. However, the trial court interjected a finding of probable cause for Booker's arrest and the State abandoned its alternative argument.

The testimony given and evidence presented at the pretrial hearings is as follows:

At about 8:30 a.m. on August 7, 1987, while working at the Red Star Laundromat, Booker received a telephone call from a woman who asked him if he knew the whereabouts of Lucy Williams, since she was not at her place of employment. Booker then telephoned Lucy's home and spoke to Lucy's son, Curtis, who informed him that Lucy had been raped and murdered. Booker left the laundromat, drove the one block to 7108 S. Cottage Grove, where Lucy lived, and proceeded to the back of the apartment building. There he was stopped by police investigating the crime scene. Booker then went upstairs to Lucy's third-floor apartment, where he introduced himself as Lucy's boyfriend to a female police officer. This officer asked him a few preliminary questions, including where he worked and how long he knew the victim.

Booker claimed that shortly after arriving he attempted to leave the apartment in order to purchase cigarettes, but that he was prevented from doing so by the female police officer. He then made some coffee and conversed with Lucy's friends and relatives who had gathered at the apartment. Shortly thereafter, at about 10 a.m., Detectives Owens and Lewis arrived at the apartment. Booker informed these detectives that he was Lucy's boyfriend and that he was willing to help the investigation in any way that he could. Thus, when asked to accompany them to the police station, Booker readily agreed.

As they left Lucy's apartment, Booker and Detective Owens walked to a nearby store, where they purchased some cigarettes. Booker then rode with the detectives in their vehicle to Area One Headquarters at 51st and Wentworth, arriving at about 11:30 that morning. Booker sat in the large processing room, where he drank coffee while the two detectives went about their business.

Booker testified that, at some point after his arrival at Area One, he asked the detectives why he was being held. He was informed that he was not being held but that the detectives in charge of the investigation were not back from the crime scene yet and that they wished to speak to him. Booker accepted this explanation and did not refuse to remain at the station. He expressed no desire to leave and did not ask if he could come back at some later time. Booker was not kept in a closed or locked room, he was not handcuffed or restrained in any way and he was not restricted from using the telephone, which he used to call his brother.

While waiting at Area One, Booker was asked if he would allow one of the detectives to inspect his hands, fingernails, shoes, feet and ankles, but he was not questioned about the killing. Booker permitted the inspection, which apparently revealed nothing noteworthy. Despite this fact, when Detectives Kelly and Ward, who were in charge of the investigation, arrived at Area One sometime after 1 p.m., they apparently had some suspicions concerning Booker's involvement in the murder. Detective Kelly explained that a friend of Lucy's, who was at the scene, had told him that Booker was a heavy drinker who often could not account for his actions and that he was "the jealous type." For this reason, at about 2 p.m., when Detectives Kelly and Ward questioned Booker for the first time concerning his relationship with Lucy and his whereabouts on the previous night, they advised him of his Miranda rights before questioning him.

The questioning took place in a conference room on the second floor of Area One station. Booker was not handcuffed or told that he was under arrest. He acknowledged his rights and agreed to speak with them. He told the detectives that on the previous night he had gone to the home of Matilda Clark, another girl friend, at about midnight and had remained there until 7:40 that morning, at which time he left for work.

Following this conversation, Booker agreed to be fingerprinted and to submit to a polygraph test. At about 3 p.m. he went with the detectives to a station at 11th and State, where his fingerprints were taken and a polygraph test was administered. The polygraph test lasted from about 3:20 to 4:20 p.m., after which the detectives and Booker were informed that he had failed the test and that the examiner believed that he had given false answers to questions he

had been asked. At this point Booker admitted to the examiner that he had lied, but indicated only that he had driven past Lucy's house a couple times on the previous evening and that he had chosen not to inform the detectives of this fact because he did not want to become involved in the investigation. The examiner relayed this information to the detectives and, at about 5 p.m. as the detectives left the station at 11th and State, they informed Booker that he was under arrest.

Booker was returned to Area One Headquarters and then Detectives Ward and Kelly continued their investigation of the murder by checking Booker's alibi. They went to the home of Matilda Clark and learned from her that Booker had not been at her apartment the entire time between midnight and 7:30 a.m., as he had indicated earlier. After the detectives left Clark's residence, at about 8:30 p.m., they received a message on the police radio notifying them that Booker had made an inculpatory statement. They then returned to Area One to resume questioning Booker.

We note that at this point in the hearing, the trial court indicated that there appeared to have been absolutely no probable cause to arrest Booker for murder. The State then asked to be allowed to present evidence for an alternative method of finding the statements admissible. The trial court declined, interjecting that it would deny the motion to quash, "but not for the reason anybody assumes." The trial court then held that there had been "ample probable cause" to arrest Booker for providing false information to the police and that the motion to quash would be denied on that basis. The trial court did agree, however, to hear additional evidence with respect to the motions.

Subsequently, Detective Glynn testified that he became involved in the murder investigation at about 6:30 p.m. on August 7, 1987, and that he began questioning Booker at about 8 p.m. that same evening. He advised Booker of his rights and, after Booker acknowledged his rights and agreed to speak with him, he questioned Booker about his whereabouts on the previous night. During this questioning, Booker initially admitted, contrary to his previous statements, that he had seen Lucy on the previous night and that she had given him $260. Shortly thereafter, Booker stated that he wanted to "tell the truth about the entire incident." He then confessed that he met with Lucy sometime after 2 a.m. on August

7, 1987, that they had argued and that he beat her to death with a pipe. After receiving this information Detective Glynn terminated the questioning and notified Detectives Kelly and Ward of the admissions Booker had made.

Detective Ward testified that, after becoming aware of the admissions Booker had made, he and Detective Kelly resumed their questioning of Booker at approximately 11 p.m. on August 7, 1987. At that time they re-advised Booker of his Miranda rights and he again acknowledged these rights and agreed to speak with them. The conversation lasted for approximately 45 minutes, after which the detectives contacted Assistant State's Attorney Inge Fryklund and relayed the information they had received. Fryklund arrived at the station at about 12:15 a.m. and at about 1 a.m. on August 8, 1987, she interviewed Booker in the presence of Detectives Kelly and Ward. She, too, informed Booker of his rights and he agreed to speak with her, first giving her an oral statement. Following this conversation, he agreed to give his statement to a court reporter. Soon thereafter, a court reporter arrived at the station and Booker made a statement in his presence.

At the close of the court-reported statement, the following colloquy took place between Assistant State's Attorney Fryklund and Booker:

> Q: Are you giving this statement voluntarily to me now?
> A: Whatever.
>
> Q: Yes or no.
>
> A: I can't really say. You are asking me what happened and I have told you. So I can't really say. Let me talk with a lawyer and then I will let you know.
>
> Q: Were there any threats or promises made to you?
> A: No.
>
> Miss Fryklund: I have no further questions. The time is about three minutes before 4:00 o'clock."

Detective Ward testified that this was the first and only time that Booker ever mentioned an attorney in any manner. Detective Ward also admitted, however, that no effort was made to obtain an attorney for Booker at that time and that, after the court-reported statement was typed, Assistant State's Attorney Fryklund returned

to the conference room where Booker was being held and asked if he would read the statement, review it for accuracy and sign it. Although Booker read the statement and orally agreed that it was accurate, he refused to sign it. This refusal was indicated on the statement and it was noted to have occurred at 5:25 a.m. on August 8, 1987. Miss Fryklund also testified at the hearing and her testimony was consistent with that of Detective Ward.

At the conclusion of all of the evidence the trial court denied Booker's motions to quash the arrest and suppress statements. The court did not specifically address the question of whether Booker was actually under arrest prior to his formal arrest, but rather, merely found that there existed, at the time of Booker's formal arrest after the polygraph exam, sufficient probable cause to arrest for obstruction of justice. The court noted that the fact that Booker had not been charged on that basis was insignificant.

The trial court then went on to specifically note that it was not determining whether there had been probable cause to arrest for the charge of murder, finding that such a ruling was unnecessary under the circumstances. The trial court also denied Booker's motion to suppress his statements, up to the point that he made the request for counsel at the close of the court-reported statement. The court ordered that the statement be redacted to eliminate any reference to Booker's response to the assistant State's Attorney's questions or comments, which may have occurred after that request for counsel.

After a jury trial, which commenced on January 23, 1989, Booker was found guilty of first-degree murder. The only alleged errors with respect to this trial are: (1) that, contrary to its prior ruling, the trial court allowed Assistant State's Attorney Fryklund to testify that Booker read and found accurate the court-reported statement and then allowed the entire, unredacted copy of the court-reported statement to be sent to the jury, and (2) that the trial court allowed the jury to view a gruesome police photograph depicting Lucy Williams' bloody and beaten head.

We shall first address the question of whether the trial court erred when it ruled on Booker's pretrial motions. This inquiry actually involves three issues: (1) whether Booker was placed "under arrest" prior to his formal arrest; (2) whether probable cause to arrest existed at the time of Booker's formal arrest; and (3) whether Booker's statements should have been suppressed as

the fruit of an illegal arrest. The trial court implicitly, if not specifically, found that Booker was not "under arrest" or illegally detained prior to the time of his formal arrest. The trial court also found that there had been probable cause to arrest Booker for obstruction of justice, whether or not there had been probable cause to arrest for the offense of murder. Consequently, the trial court denied the motions to quash Booker's arrest and suppress his statements.

After reviewing the record, this court does not believe that Booker was illegally seized or "under arrest" when he first accompanied the detectives to the police station. However, we do find that his detention became unlawful at some point prior to his formal arrest. Furthermore, we find that, at the time of Booker's arrest, probable cause did not exist.

Initially, we note that a reviewing court may not disturb the ruling of a trial court on a motion to suppress unless the decision is against the manifest weight of the evidence. (*People v. Holloway* (1981), 86 Ill.2d 78, 55 Ill.Dec. 546, 426 N.E.2d 871; *People v. Vega* (1990), 203 Ill.App.3d 33, 148 Ill.Dec. 386, 560 N.E.2d 983.) Evidence may be suppressed if it is the fruit of a seizure and custodial interrogation which violates the fourth amendment, i.e., where the intrusion or detention was unsupported by probable cause. (*Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824.) The salient question when deciding whether a seizure has taken place for fourth amendment purposes is not whether the officer's conduct was reasonable, but whether a reasonable, innocent person would have considered himself arrested or not free to leave under the circumstances. (*Hicks v. United States* (C.A.D.C.1967), 382 F.2d 158; *People v. Reynolds* (1983), 94 Ill.2d 160, 68 Ill.Dec. 122, 445 N.E.2d 766.) In the present case there appears to be no dispute that the police did not possess probable cause to arrest Booker at the time that he was transported from Lucy's apartment to the police station. Thus, the question is whether a seizure took place at this time.

In several cases, courts have held that when the police seek out a possible suspect and, essentially, enforce his presence at the police station for questioning, an arrest has taken place, whether or not the suspect was informed that he was under arrest. (See *People v. Townes* (1982), 91 Ill.2d 32, 61 Ill.Dec. 614, 435 N.E.2d 103;

People v. Sturdivant (1981), 99 Ill.App.3d 370, 54 Ill.Dec. 829, 425 N.E.2d 1046.) However, these cases are inapposite to the present case.

Here, it is clear that the police did not seek out Booker, but that Booker, completely voluntarily, appeared at the residence of Lucy Williams, made his presence known to the police, informed them of his relationship to Lucy, and then offered his assistance in their investigation. Although Booker was not merely questioned briefly at Lucy's residence, but was transported in a police car to the police station, these factors, though relevant, are not dispositive of the question of whether Booker was seized. More important is the question of whether, under the totality of the circumstances, it appears that the person's presence at the station was truly voluntary or was compelled. To hold otherwise would effectively prohibit any in-station questioning of a potential suspect, whether voluntary or not, and would severely hamper a police officer's ability to conduct an investigation.

In this case there was sufficient evidence presented at the pretrial hearing to support the notion that Booker's accompaniment of the police to the station was voluntary. Under these circumstances it seems unlikely that a reasonable person, innocent of a crime, would have believed that he was under arrest. Therefore, we do not find it to be against the manifest weight of the evidence to find that a seizure did not occur at the time Booker left Lucy's apartment.

In further support of this conclusion, we note Booker's treatment during his transport and upon his arrival at the police station. In this case Booker was not handcuffed or restrained. He was allowed to go to a store to purchase cigarettes and, upon arrival at the station, was not placed in a small, locked interrogation room, but rather, sat in the large processing room while the detectives went about their normal activities. He was not subjected to repetitious interrogation and he was allowed to use the telephone, which was readily available to him. Consequently, under the totality of circumstances, we do not believe that Booker, at least initially, was unlawfully seized.

However, just as a lawful stop of a suspect may be transformed into an unlawful seizure if the detention lasts for an unreasonable length of time (*People v. Lippert* (1982), 89 Ill.2d 171, 59 Ill.Dec. 819, 432 N.E.2d 605) so, too, we believe, in this case, Booker's

voluntary cooperation with the police investigation progressed into an unlawful detention and involuntary seizure with the passage of time. As stated in our recent case, *People v. Young* (1990), 206 Ill.App.3d 789, 151 Ill.Dec. 592, 564 N.E.2d 1254, "the fact that a defendant initially accedes to a police request to accompany them to the police station does not legitimize the treatment of defendant after he arrived at the station."

Booker was taken to the police station ostensibly so that he could provide the investigative detectives with information concerning Lucy, as well as her habits and friends, to aid in the investigation. However, as Booker was required to wait at the station from 11:30 a.m. until approximately 2 p.m., it became evident that his presence at the station was not for that stated purpose and the voluntariness of his stay became more questionable. Booker was not told that he could leave or given the option of returning at a time when the detectives in charge would be available. It appeared that Booker became the focus of the investigation at some point in time since he was asked to allow an inspection of his hands and feet. In fact, Booker testified that after a period of time, he asked some detectives at the station why he was being held. This indicates Booker's subjective belief that he was no longer free to go and that he was being retained at the police station against his will. While it is true that an individual's subjective belief as to his arrest status is not dispositive, when ascertainable, it is a legitimate consideration (*People v. Wipfler* (1977), 68 Ill.2d 158, 11 Ill.Dec. 262, 368 N.E.2d 870), and we, too, must conclude that there was a certain "quality of purposefulness" to Booker's continued retention, which made it appear to be an "expedition for evidence" that would supply sufficient probable cause. (See *People v. Townes*, 91 Ill.2d 32, 37, 61 Ill.Dec. 614, 435 N.E.2d 103, quoting *Dunaway v. New York*, 442 U.S. 200, 218, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824, 839.) For this reason, we find that Booker was seized within the meaning of the fourth amendment, prior to his formal arrest.

We further find that probable cause did not exist for Booker's arrest at this time or at the time of his formal arrest. Probable cause for arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense. (*People v. Lippert* (1982), 89 Ill.2d 171, 59 Ill.Dec. 819, 432 N.E.2d 605.)

Mere suspicion that the person arrested has committed the offense is insufficient. (*People v. Reynolds* (1983), 94 Ill.2d 160, 68 Ill.Dec. 122, 445 N.E.2d 766.) Furthermore, a probable cause determination may not be based upon the results of a polygraph examination. *People v. Jones* (1987), 157 Ill.App.3d 1006, 110 Ill.Dec. 895, 511 N.E.2d 1215.

In this case, even if we were to overlook our ruling that Booker was seized prior to his formal arrest, at no time prior to the formal arrest did the police obtain sufficient evidence to link Booker to the crime of Lucy's murder. Detective Kelly testified only that he was informed that Booker was a heavy drinker, that he sometimes could not account for his actions and that he was the jealous type. While these facts may have provided the detective with a reason to suspect Booker, it falls short of probable cause.

Also, the circumstances of the murder did not suggest any particular perpetrator. Lucy was found in an alley behind her home, beaten to death, with her purse missing. These facts do not even lead one to conclude that the perpetrator was someone Lucy knew and, since there were no known witnesses to the murder, the list of possible suspects was limitless. Additionally, Booker's answers to preliminary questioning did not implicate him in any way. The inspection of his hands and feet, his fingerprints and even his polygraph results did not provide any substantive evidence that would provide a basis for finding probable cause to arrest for the crime of murder.

Furthermore, we reject the trial court's finding that Booker's arrest was supported by probable cause to arrest for obstruction of justice. There are three reasons: (1) because we found that Booker was illegally seized prior to his submission to the polygraph test, which the court used as the basis for finding probable cause to arrest for the crime of obstruction of justice, (2) because we find that there was insufficient evidence to support a finding of probable cause to arrest for obstruction of justice since Booker's false statement about being in the vicinity of Lucy's apartment did not go beyond the limits of denying involvement and, thus were merely an exculpatory denial (see *People v. Brooks* (1977), 51 Ill.App.3d 800, 9 Ill.Dec. 802, 367 N.E.2d 236), and (3) because we do not believe that a court may find, in retrospect, that probable cause may have existed for another offense, uncontemplated by the police at the

time of arrest, to support the arrest for which no probable cause existed (see *People v. Nash* (1979), 78 Ill.App.3d 172, 34 Ill.Dec. 24, 397 N.E.2d 480).

Having found that Booker's arrest was unlawful, the next consideration is whether the subsequent inculpatory statements made by Booker must be suppressed as the fruit of his unlawful arrest. In this appeal Booker argues that his statements are a direct result of the illegal detention and, as such, should have been suppressed. The State, on the other hand, argues that, if this court finds Booker's arrest to have been illegal, this court should still find Booker's statements admissible. This is because the fact that an illegal seizure took place does not automatically require the exclusion of a subsequent confession. (*People v. Vega* (1990), 203 Ill.App.3d at 44, 148 Ill.Dec. 386, 560 N.E.2d 983.) If a confession is not obtained as a result of an exploitation of the illegal arrest, the admissions or statements may be sufficiently attenuated from the arrest so as to be purged of the taint of that arrest. *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *People v. Vega.*

As noted earlier, the State attempted to make this same argument to the trial court below but was prevented from doing so by the court's ruling. It is unclear, therefore, whether the State could have presented any additional evidence concerning this matter. For this reason, this court chooses not to rule on the admissibility of the inculpatory statements until the lower court has had the opportunity to hear any such additional evidence that may be proffered by the State and it considers whether any attenuating circumstances occurred which would have acted to break the causal link between the statements and the illegal arrest. Consequently, we reverse Booker's conviction and remand so that further proceedings may be had for that purpose.

Because of our decision to reverse Booker's conviction, we find it unnecessary to discuss the remaining two issues on appeal, which question the fairness of the trial Booker received, based on the admission of certain evidence.

REVERSED AND REMANDED.

LORENZ, P.J., and GORDON, J., concur.

No. 1-92-0956
IN THE ILLINOIS APPELLATE COURT
FIRST DISTRICT, FIFTH DIVISION

PEOPLE OF THE STATE OF LLINOIS

Plaintiff,

-vs-

CHARLES BOOKER

Defendant.

February 25, 1994

ORDER

Defendant Charles Booker was arrested for first degree murder. Prior to his jury trial, defendant filed a motion to suppress his statements made to the police, which the trial court denied. After a jury trial defendant was convicted of first degree murder and sentenced to 30 years' imprisonment.

Defendant appealed his conviction to this court. This court stayed defendant's conviction and remanded for further proceedings. (*People v. Booker* (1991), 209 Ill. App. 3d 384, 568 N.E.2d 211.) Specifically, this court held that defendant was illegally seized prior to his formal arrest and that the police did not have probable cause to arrest him. However, this court did not decide whether the subsequent statements made by defendant must be suppressed as the product of the unlawful arrest and remanded the case to the trial court for an attenuation hearing.

At the attenuation hearing the trial court considered the evidence presented at trial, this court's holding and additional testimony heard on remand. The trial court then ruled that defendant's statements were sufficiently attenuated from the unlawful arrest. Defendant appeals, contending that the State did not adequately prove a valid attenuation.

At the original hearing on the suppression motion defendant testified that on August 7, 1987, about 8:30 a.m. he was working at the Red Star Cleaners and Laundromat at 7308 South Cottage Grove. Defendant spoke with Davis Sain and then proceeded to

the apartment of deceased, Lucy Williams, at 7108 South Cottage Grove.

Defendant testified that the police would not let him into the alley so he parked his car, walked up to police and told them that he was deceased's boyfriend. Defendant was admitted into deceased's apartment and told an officer there that he had known deceased for about a year. Defendant testified that he asked the officer for a cigarette, but the officer said that she did not smoke. When defendant then said that he was going to the store to get cigarettes, the officer said that he could not leave.

Defendant then went into the kitchen, fixed a cup of coffee and spoke with two detectives who asked him about his relationship with deceased. The officers then asked defendant if he would go to the police station for questioning, and defendant agreed because he felt that he must.

The officers and defendant left the apartment for the police station, stopping at the store to get cigarettes. He was not handcuffed. Upon their arrival defendant was placed in an unlocked room. Sometime later an officer came into the room, asked if he could look under defendant's fingernails and at his feet for blood and then left. Thereafter, defendant walked out of the room and asked why the police were holding him. They said that they were not and to wait until the other officers got back. No one ever told defendant that he was free to leave.

Ultimately Detectives Kelly and Ward came back and asked defendant what he had done the night before. Defendant told them he had gotten off work, dropped a friend off, got liquor and drank it. After a while detective Kelly asked if defendant would take a polygraph examination, and defendant agreed because he felt that he must.

Defendant was transported to police headquarters where he was fingerprinted and given a polygraph examination which he was informed that he did not pass. Detectives Ward and Kelly then took defendant back to the police station where he was formally placed under arrest.

Chicago police detective William C. Owens testified that on August 7, 1987, he was at 7108 Cottage Grove assisting in the homicide investigation of deceased whose body was found in the

alley next to an automobile.

About 10 a.m. defendant came to the murder scene, said that he was deceased's boyfriend and offered to assist the police in their investigation. Detective Owens and his partner asked if defendant would go to a local police station and defendant agreed. The group first stopped at the corner for cigarettes and a can of soda and then proceeded to the police station. Upon arriving there about 11:30 a.m. defendant remained seated in the large area where the officers did their typing. He was not handcuffed and was never told he was not free to leave. About 1:15-1:30 p.m. Detectives Kelly and Ward returned. Prior to this defendant never stated that he wanted to leave. However, the officers never told him that he could go and never told him he did not have to answer questions.

Chicago police detective Torrence Lewis testified that on the morning of August 7, 1987, defendant came to 7108 Cottage Grove where Lewis was investigating the murder and said that he wanted to help in any way he could. About 11:30 a.m. defendant went with Lewis and his partner to the local police station after stopping for cigarettes. Lewis and his partner went about their business because Ward and Kelly were to question defendant. About 1:15 p.m. Detectives Ward and Kelly came into the office. Lewis never handcuffed defendant or told him that he was not free to leave. Further, defendant never said that he wanted to leave or that he wanted an attorney. Lewis never questioned defendant concerning deceased's death.

Detective Thomas Kelly testified that on August 7, 1987, he was investigating deceased's murder. At the scene another officer informed Kelly that the fiancee of the deceased was in the third-floor apartment. Kelly then told Detective Owens to question family members to get information about the deceased and to see if defendant wanted to go to a local police station. He later saw defendant walking down the stairs with Owens and Lewis.

About 1:15 p.m. Kelly next saw defendant at that station. Defendant was not handcuffed. Forty-five minutes later defendant, Kelly and Ward went into a conference room. Defendant was advised of his Miranda rights and stated that he wanted to talk. According to Kelly defendant was not under arrest at this time, however, he was advised of his Miranda rights because Kelly and Ward had talked to a witness who said that defendant was a heavy

drinker who often could not account for his actions and who was also a very jealous person.

Defendant told the detectives that on the previous night until that morning at 7:40 a.m. he was at his other girl friend's apartment at 7102 South Jeffrey. According to defendant, he then went straight to work.

Detective Kelly testified that after talking with defendant, Kelly asked if defendant would go to police headquarters for fingerprinting and a polygraph, and defendant agreed. Defendant was not restrained in any manner on the way there. About 3:20 p.m. Officer Tovar administered a polygrapy test. Upon completion of the test Officer Tovar showed Kelly and Ward the result, which indicated that defendant had lied about his knowledge of deceased's death. After Tovar told defendant the results of his test, defendant changed his story and said that he had in fact driven by deceased's residence on the night of August 6 and the early morning hours of the next day. Defendant was placed under arrest.

After bringing defendant back to the local police station and typing the arrest report, Kelly and Ward went ot see Matilda Clark, who defendant claimed could provide him with an alibi. Ms. Clark, however, said that defendant had not been with her. Upon leaving Ms. Clark's apartment they received a message to call their office. They did and spoke with Detective Glynn who said that defendant had confessed to deceased's murder.

Officer Kelly testified that he considered defendant under arrest at 5:45 p.m. Kelly based the arrest on the fact that defendant told Tovar that he had lied to Kelly and Owens and that he had been in the area of the deceased's residence about the time of her death.

Officer Stephen Glynn testified that he became involved in this investigation about 6:30 p.m. after speaking with Ward and Kelly. Glynn interviewed defendant about 8 p.m. after reading him his Miranda rights. Defendant said that he understood his rights and wanted to talk. Initially, defendant said that he had gone to deceased's house to get $260 from her. When Glynn confronted defendant with inconsistencies in his statements and with the fact that Ward and Kelly were going to check his alibi, defendant said that he wanted to tell the whole truth. Defendant was not handcuffed at this time, was clear-headed and was speaking normally.

Defendant related to Glynn that he and deceased had broken up several weeks prior to the incident, and he moved out of the apartment. He was mad about these developments and the fact that deceased owed him $400. On the evening of August 6, 1987, defendant telephoned deceased, but she would not talk to him. Defendant continued drinking that night, and about 2:10 a.m. he telephoned deceased again and she agreed to talk to him on her way to work.

Defendant drove to the rear of 7108 Cottage Grove and waited for deceased. When she came out, they started to argue, and deceased gave defendant $260 of the money she owed him. When deceased started swearing at him, defendant picked up a pipe and hit her on the head. Deceased then started to blow on the car horn, and he continued to hit her with the pipe. He then left and went to his other girl friend's house to sleep.

According to Glynn, defendant was not threatened, he was not promised anything and he never asked for a lawyer. Detective Glynn did not give defendant anything to eat and did not know the last time defendant sleep or ate before his statement.

Detective Glynn then called Kelly and Ward and told them that defendant had confessed. About 11 p.m. Kelly, Ward and Glynn questioned defendant after informing him of his Miranda rights. Defendant said that he understood and repeated his oral confession. This conversation lasted about 40 minutes. Detective Ward testified that defendant stated he understood the Miranda warnings. Following his statements the police called for an assistant State's Attorney who arrived about 12:15 a.m.

Both Detective Ward and Assistant Sate's Attorney Inge Fryklund testified that she talked with defendant a little after 1 a.m. After defendant was advised of his Miranda rights, he repeated his oral confession and agreed to give a statement to a court reporter. With the court reporter present defendant was again told his rights and repeated the details of his crime. At the conclusion of this procedure defendant asked for an attorney and refused to sign the confession.

Officer Ward further testified that sometime on the date of defendant's arrest, defendant was given a sandwich and coffee. Defendant told Ward that he had gotten up about 7 a.m. that

morning.

At the conclusion of all the evidence at the original hearing on the motion to suppress, the trial court denied defendant's motion. The trial court did not specifically address the question of whether defendant was under arrest prior to his formal arrest or whether there was probable cause to formally arrest him for murder; it found that there existed at the time of defendant's formal arrest after the polygraph examinations sufficient probable cause to arrest for obstruction of justice. The court also denied defendant's motion to suppress his statements, up to the point that he made the request for counsel at the close of the court-reported statement. The case proceeded to a jury trial. The defendant was found guilty of murder and sentenced to 30 years' imprisonment.

Defendant appealed his conviction and as stated previously this court stayed defendant's conviction and remanded for an attenuation hearing.

Detective Thomas Kelly testified at the attenuation hearing that at about 1:15 or 1:30 on the afternoon of August 7, 1987, he arrived back at the police station where he saw defendant seated in a chair at a table in the general work area. About 2 p.m. Kelly and Detective Ward spoke with defendant for about 45 minutes after reading him his Miranda rights. They then took defendant to police headquarters for a polygraph examination.

About 6:15 p.m. Kelly, Ward and defendant arrived back at the local police station. Defendant was then placed in a locked interview room, and Kelly did not speak with defendant between 6:15 and 8 p.m.

Detective Steve Glynn spoke with Kelly and Ward at about 6:15 or 6:30 p.m. He did not speak with defendant between the hours of 6:15 and 8 p.m., and he did not see any other officers speak with defendant between these hours.

The trial court found that defendant's confession was sufficiently attenuated from the illegal arrest. The court also made certain findings of fact. The court found that defendant was a smart, confident, assertive and aggressive person who, as evidenced by his conduct, showed no fear of the police. The court further commented that there was an intervening circumstance because defendant was made aware that his alibi was not valid. The court

concluded that defendant was maintained in a quasi-public area of the police station, no police mistreatment or coercion occurred and defendant was advised on his Miranda rights on numerous occasions.

Defendant contends that the trial court erred in finding that his oral admissions were sufficiently purged of the taint of his illegal arrest.

Whan a confession is obtained from a defendant through custodial interrogation after an illegal arrest, the confession must be suppressed unless the State can establish the intervening events broke the causal connection between the illegal arrest and the confession so that the confession is sufficiently an independent act of free will. (*Brown v. Illinois* (1975), 422 U.S. 590, 602, 45 L. Ed. 2d 416, 426, 95 S. Ct. 2254, 2261.) The United States Supreme Court in *Brown v. Illinois* identified several factors that must be considered in determining whether a confession has been purged of the taint of the illegal arrest:

> The Miranda warnings are an important factor, to be sure, in determing whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The proximity of the arrest and the confession, the presence of intervening circumstances, [citation], and, particularly, the and purpose flagrancy of the official misconduct are all relevant." *Brown v. Illinois* 422 U.S. at 603-04, 45 L. Ed. 2d at 427, 95 S. Ct. at 2261-62.

The giving of Miranda warnings alone is not sufficient to purge the taint of an illegal arrest. (*People v. Holveck* (1990), 141 Ill. 2d 84, 98, 565 N.E.2d 919.) Recently, in *People v. Beamon* (1st Dist. October 8, 1993), No. 1-92-0145, this court examined the same question presented herein. In *Beamon* this court emphasized that "temporal proximity" is the least instructive factor in determining attenuation and that the presence of interviewing circumstances is the most important.

In attempting to establish attenuation, the state argues that intervening circumstances occurred when the defendant was confronted with the fact that his alibi could not be substantiated. The confrontation of an arrestee with untainted evidence may constitute an

independent intervening circumstance. However, confrontation with incriminating evidence purges the taint of the illegal arrest only where the evidence itself is not a product of the illegal arrest. (*People v. Beamon* (1st Dist. October 8, 1993), No. 1-92-0145, slip op. at 6; *People v. Avery* (1989), 180 Ill. App. 3d 146, 154 N.E.2d 1296.) Here, this court found in the first appeal that defendant was illegally detained prior to his giving his alibi. That finding is now the law of this case. (*People v. Thomas* (1981), 94 Ill. App. 3d 895, 419 N.E.2d 480.) His confession was obtained by exploitation of his previous statements given while illegally detained.

Further, although the oral admissions were given several hours after the illegal arrest, they were given after defendant was confronted numerous times throughout the day with his inconsistent statements. These statements were all made as a result of defendant's illegal detention. No intervening factors were present in this case.

The final factor to be considered under Brown is the purposefulness and flagrance of the official misconduct. An arrest has a quality of purposefulness where it is an expedition for evidence admittedly undertaken in the hope that something might turn up. (*Avery*, 180 Ill. App. 3d at 156.) This court in the first appeal found that between 11:30 a.m. until about 2 p.m. it became apparent that there was a "quality of purposefulness" to defendant's continued detention which made it appear to be an "expedition for evidence" that would supply sufficient probable cause. No additional evidence was presented at the attenuation hearing that would refute this finding. We conclude that the trial court's determination of attenuation is contrary to the manifest weight of the evidence.

We therefore reverse the judgment of the circuit court and remand for a new trial where the incriminating oral admissions must be suppressed.

Reversed and remanded.

Gordon, J., with McNulty and Cousins, Jr., JJ., concurring